91-814

Supreme Court, U.S.
FILED
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHAMP CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, LOCAL 509,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May an employer be held responsible under the National Labor Relations Act for any employee backpay obligation which accrues while the case is pending on review before the National Labor Relations Board for an unconscionable length of time in violation of the Administrative Procedures Act?

2. May a federal court determine, consistent with national labor policy, that an economic strike was converted into an unfair labor practice strike absent any evidence that the strike was prolonged by the alleged unfair labor practices?

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit, as amended, is reported at 933 F.2d 688, and is reprinted in the Appendix hereto at Volume I, p. 1.[1] The prior superseded opinion of the Court of Appeals for the Ninth Circuit is reported at 913 F.2d 639, and is reprinted in the Appendix hereto at Volume I, p. 54.

The Decision and Order of the National Labor Relations Board is reported at 291 NLRB No. 119, and is reprinted in the Appendix hereto at Volume I, p. 103. The Decision of Administrative Law Judge Joan Wieder is printed as part of the Decision and Order of the National Labor Relations Board reported at 291 NLRB No. 119 and is reprinted in the Appendix hereto at Volume II, p. 1.

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[1] Champ Corporation has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

JURISDICTION

The original judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 29, 1990. Thereafter, Petitioner filed a timely Petition for Rehearing. The Court of Appeal denied said Petition and filed an amended judgment on May 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of Sections 8 and 10 of the National Labor Relations Act (29 U.S.C. § § 158 and 160) and Sections 551 and 555 of the Administrative Procedure Act (5 U.S.C. § 551 and 555) are set forth in the Appendix at pp. 640-656.

STATEMENT OF THE CASE

The instant case arises from an Application for Enforcement of an Order of the National Labor Relations Board

(hereinafter "the Board"). The jurisdiction of the Court of Appeals was invoked under § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e).

In December, 1978, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "the Union") was certified as the exclusive collective bargaining representative for certain employees of Petitioner Champ Corporation (hereinafter "Champ"). After several months of collective bargaining, the parties reached an impasse and the Union commenced an economic strike against Champ.

During the course of the strike, the Union filed several unfair labor practice charges against Champ. The strike was eventually terminated by the Union in April 1980 after it became evident that, in the words of the Union's chief negotiator "the strike [and] the picket lines were not

really effective". During the collective bargaining sessions, the union never made any of Champ's alleged unfair labor practices the subject of negotiation.

In early 1980, Region 21 of the National Labor Relations Board issued a Complaint and Notice of Hearing which alleged that Champ had engaged in several unfair labor practices within the meaning of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. Champ denied it had committed any unfair labor practices and the matter was set for hearing.

Twenty days of hearing took place between December 1, 1980 and April 2, 1981 at the offices of Region 21. On February 4, 1982, Administrative Law Judge Joan Wieder issued her decision and recommended Order which concluded that Champ had committed numerous unfair labor practices. In addition, Judge Wieder determined that the

economic strike was converted into an unfair labor practice strike by certain of the alleged unfair practices. Accordingly, Judge Wieder proposed that Champ be required to collectively bargain with the Union and, based on her finding of the conversion of the strike, that Champ offer reinstatement to the striking employees and compensate them for any back pay which they lost from the date of the alleged conversion of the strike to the date of her order.

Following the issuance of Judge Wieder's Decision and Recommended Order, Champ filed exceptions thereto as did the General Counsel and the Union. All such exceptions were filed in early 1982. The issues raised were thereby presented to the Board for determination. On November 25, 1988, over six and one-half years after submission of the parties' exceptions, the Board issued its Decision and Order which affirmed the vast majority of the

Administrative Law Judge's Decision and Proposed Order, including her recommendations that Champ pay back wages to numerous employees from certain dates in 1980 "to present".

The Board filed an application for Enforcement with the United States Court of Appeals for the Ninth Circuit on or about April 7, 1989. As stated above, the Court of Appeals eventually issued its amended decision, granting enforcement of the Board's Order, on May 20, 1991.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision to enforce the National Labor Relations Board's Order which requires Champ to compensate numerous striking employees for back pay lost since 1980 completely ignores the fact that virtually 75 percent of any such economic loss flows directly from the Board's inexcusable neglect in processing its review of the instant case. As stated

above, the parties submitted their exceptions to the Administrative Law Judge's Decision and Proposed Order in March of 1982. It was not until late November, 1988, over six and one-half years after the submission of the exceptions by the parties, that the Board issued its Decision. No reason whatsoever has ever been given by the Board for its inordinate delay, nor did it give any consideration to the consequences of said delay.

In its brief to the Ninth Circuit, Champ expressed concern that, due to the fact that almost a decade had passed since the commencement of the strike giving rise to this action, the consequences of enforcing the Board's Order would most likely prove economically fatal to the Company. While such a fact may usually be irrelevant for the purposes of deciding whether to enforce an Order of the Board, the instant situation is not "usual".

Rather, the Board's unexplained and inexcusable procrastination in its review of this case is exclusively responsible for the vast majority of any economic losses (which have been estimated to potentially be as much as $10,000,000.00) suffered by the striking employees. To ignore this fact and blindly hold Champ responsible for all of such consequences flies in the face of both justice and equity. This is not the only recent case in which the Board's inordinate delay has been raised as an issue in deciding whether to enforce an order of the Board. See, N.L.R.B. v. Country Food Store, Inc., 931 F.2d 21 (8th Cir. 1991)(7 year delay by Board; enforcement denied); Texas Petrochemicals Corp. v. N.L.R.B., 923 F.2d 398 (5th Cir. 1991) (4 1/2 year delay by Board; order modified and remanded); N.L.R.B. v. Brookshire Grocery Company, 919 F.2d 359, 365 n. 6, (5th Cir. 1990); Emhart Industries, Hartford Division v. N.L.R.B.,

907 F.2d 372 (2d Cir. 1990) (3 1/2 year delay by Board; enforcement denied). In these cases, it has been recognized that the federal courts have been charged by congress with "responsibility for the reasonableness and fairness of Labor Board decisions." Emhart Industries, supra, 907 F.2d at 379, quoting Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490, 71 S.Ct. at 466. (1951)

In addition, it has been acknowledged that the Board is bound by the requirements of the Administrative Procedure Act, 5 U.S.C. § 500 et seq. and that one of the seminal requirements of said Act is that an agency endeavor to "conclude a matter presented to it" within a "reasonable time." 5 U.S.C. § 555(b). Texas Petrochemical, supra, 923 F.2d. at 404.

In the instant case, the Board's delay of over six and one-half years is a clear and gross violation of its obligations under the Administrative Procedures Act.

Consequently, the Ninth Circuit's decision, which ignores the dilatory conduct of the Board, constitutes an abdication of its responsibility to ensure the reasonableness and fairness of the Board's decisions. Accordingly, this Court should grant a writ to remedy the Ninth Circuit's error.

Beyond the issue of the Board's delay, the Ninth Circuit's decision is also fatally flawed in that it redefines established principles concerning the conversion of economic work stoppages into unfair labor practice strikes. In its initial decision, issued August 29, 1990 (Appendix p. 54), the Court appeared to create a new standard for deciding whether an economic strike had been converted into an unfair labor practice strike. Because of the multiplicity of questions created by this portion of the court's original opinion, Champ requested rehearing on the issue of conversion. The court ultimately denied Champ's petition but

also, at the same time, amended it's decision to clarify the standard for conversion that it was adopting. (Appendix p. 1.)

Prior to the Court of Appeals' decision in this case, the standard for a finding of conversion of a strike was well established. "An employer's unfair labor practice will convert an economic strike into an unfair labor practice strike only where there is substantial evidence that the unfair labor practice prolonged the strike." N.L.R.B v. Burkart Foam, Inc., 848 F.2d 825 (7th Cir. 1988) (emphasis added). In Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1079-80 (1st Cir. 1981), a case bearing strong similarity to the instant matter, the court held that before a Board order finding conversion of a strike can be enforced"

. . .[i]t must not only be shown that the employer committed an unfair labor practice after the commencement of the strike, but

that as a result, the strike was 'expanded to include a protest over (the) unfair labor practice' and that the settlement of the strike was thereby prolonged." Id. at 1079-80, quoting N.L.R.B. v. Top Mfg. Co., 594 F.2d 223, 225, (9th Cir. 1979) and N.L.R.B. v. Moore Business Forms, 574 F.2d 835, 840 (5th Cir. 1978) (emphasis added). The Soule court noted that the employees therein had been made aware of the employer's unfair labor practices and decided not to return to work until they were rectified. However, the court also noted that there were numerous other points of contention between the parties. In light of these facts, the court concluded that "[t]he most that could be inferred from [the employees' response to the employer's unfair labor practice], standing alone, is that the wage increase may have 'aggravated (the company's) differences with the Union' on the crucial wage issue', Kohler Co., 128 N.L.R.B. 1062,

1083-84 (1960), and thereby caused the union to hold out for a higher offer or to persist with higher demands than it otherwise would have. In context and without some further corroboration in the record, however, the latter inference is an unduly tenuous and speculative basis on which to hinge the board's determination of the fundamental nature of the strike and the harsh remedial consequences that flow from such a determination. Id. at 1081 (emphasis added). Thus, it is not sufficient that the striking employees were aware of the alleged unfair labor practices; the standard previously accepted by the courts was that the record must also supply the court with evidence that the strike was actually prolonged by such acts.

While the Court of Appeals herein stated its intention to adopt the conversion standard accepted by other courts of appeals, it thereafter ignored the fact

that, under that standard, there cannot be a finding of conversion in the absence of substantial evidence in the record that any of the alleged unfair labor practices in any way prolonged the strike. Rather, the record evidence establishes only that issues which separated the parties throughout negotiations remained the stumbling blocks to achieving a collective bargaining agreement and the Union's chief negotiator testified that the strike was ultimately terminated because it became "increasingly evident that the strike [and] the picket lines were not really effective." At that time, the Union submitted unconditional offers of reinstatement for all striking employees. Accordingly, it is clear that any alleged unfair labor practices were not at issue at that time.

In spite of the fact that the evidence conclusively precludes a finding of conversion of the strike, the Court of

Appeals enforced the Board's Order. In order to do so, it focused not on the impact the unfair labor practices had on the strike, but rather, on the Union's ostensible reaction to the alleged illegal acts. In so doing, the Court ignored the basic proposition that the simple commission of an unfair labor practice during the course of a strike does not automatically convert it into an unfair labor practice strike. N.L.R.B. v. Jarm Enterprises, Inc., 785 F.2d 195, 204 (7th Cir. 1986).

It can be unequivocally stated that a union will always be opposed to an employer's alleged unfair labor practice. It is for this reason that the focus of inquiry must be on the impact of the alleged unfair labor practices on the strike. This is particularly true due to the extreme consequences (i.e., reinstatement and backpay) which flow directly from a determination that the strike was converted.

It is axiomatic that if the strike is unaffected by the unfair labor practice, it cannot have been converted by it. In the instant case, the record evidence is conclusive: Champ's alleged unfair labor practices in no way prolonged the strike, which ran its normal course and was affected only by legitimate issues of collective bargaining and the economic impact of replacement employees. This being the case, the court violated established principles of federal labor law in ruling that the economic work stoppage was converted into an unfair labor practice strike by Champ's alleged practices and in so doing dramatically altered the delicate balance between the interests of labor and management which has existed since the passage of the National Labor Relations Act in 1935.

The implications of the Court of Appeals' decision on national labor policy

are monumental. If this decision is allowed to stand, employers will now be faced with a greatly increased potential for a finding of conversion of a strike, as well as the threat of actual extinction due to the economic consequences of the Board's inordinate delay. Given this situation, employers will be compelled to capitulate in negotiations rather than accept a strike and assume such risks. It is, therefore, indisputable that the court's decision serves to tip the scales in favor of labor and thereby upsets the balance between labor and management which Congress and the courts have striven to achieve for over 50 years.

In light of the Ninth Circuit's unwarranted reinterpretation of the traditional conversion standard, and its refusal to enforce the explicit requirements of the Administrative Procedures Act, it is submitted that this Court, in the exercise

of its supervisory powers over the federal judiciary, should settle these important questions of law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ for Certiorari should be granted.

DATED: August 16, 1991

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APPENDIX TO

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VOLUME 1

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	No. 89-70160
Petitioner,	)	
v.	)	NLRB NOS.
	)	21-CA-18696
CHAMP CORPORATION,	)	21-CA-19007
	)	21-CA-19423
Respondent.	)	21-CA-19424
	)	
	)	**ORDER AND**
	)	**AMENDED**
	)	**OPINION**

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted

June 8, 1990---Pasadena, California

Filed August 29, 1990

Amended May 20, 1991

Before: Arthur L. Alarcon, Melvin Brunetti and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Alarcon

ORDER

The opinion filed August 29, 1990, and reported at 913 F.2d 639 (9th Cir. 1990) is hereby amended as follows:

1. On Slip op., page 9751, second full paragraph, first sentence following the word, "practices," add:

"thereby aggravating or prolonging the strike."

2. Continuing on Slip op., page 9751, same paragraph, second sentence, after the words: "...expanding the issues in this labor dispute," add the following:

"thereby delaying settlement."

3. On Slip op., page 9758, line 7 of the first full paragraph delete the remainder of the paragraph commencing with "Champ has failed to cite..." Insert instead:

"We agree with Champ that the burden is on the General Counsel to prove that the unfair labor practices aggravated or

prolonged the strike. In N.L.R.B. v. Top Manufacturing Co., Inc., 594 F.2d 223 (9th Cir. 1979), we were called upon to determine whether an economic strike had been converted into an unfair labor practice strike. Id. at 225. We began our discussion of the applicable law by stating "the controlling legal principles are not controverted." Id. Unfortunately, we cited no authority for this proposition. Instead we described the "controlling legal principles" in the following words: "A strike begun in support of economic objectives becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices." Id. By using this language to reflect "controlling legal principles," we did not intend to adopt a new rule. To make clear what is implicit in our decision

in Top, we agree with those circuits that have adopted the principle that violations of the National Labor Relations Act which aggravate or prolong an economic strike will convert it to an unfair labor practice strike. See Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1080 (1st Cir. 1981) (finding no conversion where the unfair labor practice did not prolong the strike or result in a delayed settlement); See also C-Line Express, 292 N.L.R.B. No. 63 (1989) (finding no conversion where the unfair labor practice did not cause a prolongation of the work stoppage); Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B., 718 F.2d 269 (8th Cir. 1983) (finding conversion where the unfair labor practice prolonged the strike); Facet Enterprises, Inc., v. N.L.R.B., 907 F.2d 963, 977 (10th Cir. 1990)

(applying the prolong or aggravate test and finding conversion where a strike was expanded to include a protest over unfair labor practices)".

4. On Slip op., page 9758, in the third line from the bottom of the page after the word, "employees" add the following words to that sentence:

"and delayed settlement of the strike".

5. On Slip op., page 9759, delete the entire first full paragraph starting with "Champ asserts..." and ending with "law of this circuit."

The panel as constituted in the above case has voted to deny the petition for rehearing and reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on

the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

OPINION

ALARCON, Circuit Judge:

The National Labor Relations Board (Board) has applied to this court for enforcement of its Decision and Order entered on November 25, 1988. The Board found that Champ Corporation (Champ) committed unfair labor practices by discharging employees while they conducted an economic strike. The Board concluded that these unfair labor practices converted the employees' economic work stoppage into an unfair labor practice strike. As a result, the Board ordered, inter alia, that Champ cease and desist all unfair labor practices and reinstate all striking employees with backpay from the date

of their unconditional offer to return to work.

Champ contends that substantial evidence does not support the Board's finding that any striking employees were fired during the economic strike. Champ also argues that the Board erred as a matter of law in concluding that the alleged discharge of the employees converted an economic work stoppage into an unfair labor practice strike.

The primary issue we must decide is whether Champ's conduct in discharging certain striking employees converted an economic work stoppage into an unfair labor practice strike by expanding the issues in dispute to include a protest regarding the company's alleged unfair labor practices thereby aggravating or prolonging the strike. We conclude that the Board's finding that economic strikers were discharged is supported by substantial evidence and that

this conduct became a contributing factor in expanding the issues in this labor dispute thereby delaying settlement. We discuss each issue and the facts pertinent thereto under separate headings.

I

SUBSTANTIAL EVIDENCE OF UNFAIR LABOR PRACTICES

Champ asserts that the Board's finding that the company was guilty of unfair labor practices because certain employees were discharged on or before October 25, 1979 is not supported by substantial evidence. We disagree.

We must uphold the Board's decision if its factual findings are supported by substantial evidence and if it has correctly applied the law. NLRB v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1989); Lippincott Indus., Inc. v. NLRB, 661 F.2d 112, 114 (9th Cir. 1981). If there is

evidence to support two conflicting views, the Board's findings must be allowed to stand even though we might have reached a different conclusion on our own. NLRB v. Pacific Grinding Wheel Co., 572 F.2d 1343, 1347 (9th Cir. 1978). Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows they are incorrect. Lippincott, 661 F.2d at 114.

A. **The Discharge of Baugh and Naranjo**

[1] Because contract negotiations reached an impasse on economic issues, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America--UAW, Local No. 509 (the Union) ordered a work stoppage on October 15, 1979. Prior to that date, on October 3, 1979, Tom Simovich, Champ's general manager, presented a list to a deputy sheriff containing the names of nine employees. Simovich told the

officer that these employees might cause problems in the event of a strike. Steven Baugh's name was on the list.

On October 17, 1979, Baugh and Jose Naranjo were picketing in front of one of Champ's building. Tom Simovich came out of the building and spoke to Naranjo. He told Naranjo that "he might as well go home" because he "didn't work here anymore." Baugh said "what about me, Tom?" and Simovich replied "[y]ou're fired, too. You might as well go home." Simovich then told Baugh and Naranjo that he would have them arrested if they did not leave. Baugh asked Simovich why he was fired but Simovich did not reply. Baugh then told Simovich, "[w]e still love you, Tom. We just want a contract." Simovich testified that he had had no conversation with Baugh or Naranjo during the first week of the strike. The ALJ found that Simovich's testimony was not credible.

The Board concluded that the testimony of Baugh and Naranjo was sufficient to show that they were discharged in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3) (the Act).[1] The Board stated that "Simovich's remarks were entirely unequivocal in character, were phrased as an immediate discharge, were accompanied by a direction to leave the employment site with a concurrent threat of arrest, and were uttered by a high

---

[1]

§ 158. **Unfair labor practices**

a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

29 U.S.C. § 158(a)(1), (3) (1988).

management official so as to lend credence to the finality of the action taken."

Champ contends that there is substantial evidence in the record that supports a finding that Baugh and Naranjo did not believe that they had been discharged. Champ characterizes the conversation among Simovich, Baugh, and Naranjo as a jovial, facetious exchange. As further proof that no discharge occurred, Champ notes that Baugh and Naranjo continued picketing and reported for reinstatement on April 21, 1980, and that Baugh continued serving as a member of the Union's negotiating team. In addition, Champ contends that the letter sent to all striking employees on October 30, 1979 requesting them to return to work demonstrates that Baugh and

Naranjo were not discharged on October 17, 1979.[2]

"No set words are necessary to constitute a discharge; words or conduct, which would logically lead an employee to

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[2] The letter reads as follows:

We have been waiting patiently for you to return to your job and we shall continue to do so until Friday morning, November 2, at 8 a.m.

If you choose to keep your job, drive in the gate where the guards are just south of the company's main office and go to the personnel office--you will be put to work immediately.

There is plenty of work and CHAMP will continue to operate!

If you choose not to return to your job, you may Lose Your Job Entirely! The company is not continuing the health and life insurance of persons not working--if you want to keep your health and life insurance protection for you and your family, you may do so by calling (213) 444-9561 for instructions.

We do hope that you will give very careful consideration to this opportunity and to your future, and return to work now!

believe his tenure had been terminated, are in themselves sufficient." NLRB v. Cement Masons Local No. 555, 225 F.2d 168, 172 (9th Cir. 1955). "The test of whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer." Pennypower Shopping News, Inc. v. NLRB, 726 F.2d 626, 629(10th Cir. 1984) (emphasis in original); accord NLRB v. Downslope Indus., Inc., 676 F.2d 1114, 1118 (6th Cir. 1982); NLRB v. Ridgeway Trucking Co., 622 F.2d 1222, 1224 (5th Cir. 1980) (per curiam); NLRB v. Trumbull Asphalt Co, 327 F.2d 841, 843 (8th Cir. 1964). In Health Enterprises of America, Inc., 273 NLRB, 1196 (1984), the Board held that a top management official could be taken at his word when he told an employee that he was fired. Id. at 1204. In Trident Recycling Corp., 282 NLRB 1255 (1987), the Board stated that it must view

the evidence through the strikers' eyes. Id. at 1260. "Each case requires an examination of the facts." Id.

[2] Simovich's statements that Baugh and Naranjo were "fired" and" might as well go home" would lead reasonable workers to believe they had been discharged. As a high management official, Simovich had the power to discharge employees; the employees were entitled to take Simovich at his word. Health Enters. of Am., Inc., 273 NLRB at 1204. Simovich backed up these statements by threatening to have Baugh and Naranjo arrested if they did not leave. Champ has made no showing that the ALJ's credibility determinations were erroneous. See Lippincott, 661 F.2d at 114 (deference must be given to a ALJ's credibility determinations absent a clear preponderance of the evidence to the contrary).

[3] The fact that Baugh and Naranjo continued picketing and that Champ subsequently reinstated them after the Union agreed to terminate the strike does not alter our conclusion that it was reasonable for them to believe that they were discharged on October 17, 1979. It is not unusual for an employee who has been unlawfully discharged for union activity to continue to picket. In Health Enterprises of America, Inc., 273 NLRB 1196 (1984), the Board concluded that a discharged employee's continued picketing did not alter the fact of his discharge. Id. at 1203-04. The fact that Baugh and Naranjo presented themselves for reinstatement does not demonstrate it was unreasonable for them to believe that on October 17, 1979 they had been discharged. See Pennypower Shopping News, 726 F.2d at 630 (holding that subsequent reinstatement did not alter a finding of discharge where that employer had

created ambiguity as to its employees' status); Central Broadcast Co., 280 NLRB 501, 504 (1986) (holding that a subsequent reinstatement did not alter the fact that a discharge took place).

B. **The Discharge of Valenzuela, Solis, Gutierrez, and Ortiz**

On October 25, 1979, Champ's negotiator, Edmund Hoy, Jr., met with Ralph Gazzigli, the Union's negotiator. Hoy handed Gazzigli a list, prepared by Tom Simovich, containing the names of Steve Baugh, Heriberto Valenzuela, Joe Solis, Ruben Gutierrez, and Eduardo Ortiz. Hoy informed Gazzigli "very adamantly" that the individual on the list "would never be rehired, or reinstated under any conditions." Gazzigli informed Hoy that he could not negotiate away any employee's job and handed the list back to Champ's negotiator. Gazzigli testified that he told Hoy "there was no way I could negotiate, or

agree to single out any persons as far as negotiating the job away...I couldn't do that, I wouldn't do it." Prior to giving back the list, Gazzigli read all of the names on the list.

At a subsequent negotiating session, on October 31, 1979, Hoy again attempted to present the list to Gazzigli. Tom Simovich, Steve Baugh, and a federal mediator were also present. Hoy stated that he wanted to present the list containing the names of individuals who would not be rehired under any circumstances, regardless of whether a contract was formed. Gazzigli again informed Hoy that he would not negotiate anyone's job away. He cautioned Hoy against formally presenting the list. The mediator intervened. The list was never formally presented at the negotiating session. Baugh saw his name on the list when it was placed on the table by Hoy.

The Board concluded that each of the employees named in the list had been discharged by Champ. The Board determined that the employment status of these individuals had been removed by Champ as a negotiable matter, thereby "effectively implementing their discharges." The Board further stated that "Hoy's characterization of the employment tenure of the employees on the list was clear and unambiguous: they would 'never' resume their employment 'under any conditions.'"

Champ argues that the employees on the list were not discharged. First, Champ claims that "there is no credible evidence" that the employees knew their names were on the list. Second, Champ contends that the list was presented as a negotiable matter, not as "a firm and final decision."

As discussed above, the test for determining if Valenzuela, Solis, Gutierrez,

and Ortiz were discharged is whether a reasonable employee would have believed he was terminated by the employer's conduct. NLRB v. Cement Mason Local No. 555, 225 F.2d at 172. An employee must be aware of the employer's actions, otherwise he would have no basis for inferring his employment had been terminated. See Health Enters. of Am., Inc., 273 NLRB 1196, 1204 (1984) (finding no discharge where neither employees nor union was aware that employer had stamped "terminated" on timecards).

The record shows that Gazzigli, the Union negotiator, saw all of the names on the list. Baugh also saw Joe Solis' name on the list. On November 5, 1979, at a Union meeting, Baugh and Gazzigli discussed the no reinstatement list with all the Union members. The evidence shows that the discharge issue dominated all of the discussion at the proceedings at the Union

meeting. Accordingly, substantial evidence exists to demonstrate that the striking employees were aware of Champ's actions. See Martin Arsham Sewing Co., 244 NLRB 918, 918 (1979) (Board held discharge had occurred where union officials were aware of company's conduct and communicated that information to the employees).

[4] We hold that Champ's conduct in showing the list to Union officials and stating unequivocally that the listed employees would never be reinstated regardless of whether a contract was reached, was substantial evidence demonstrating that the named employees reasonably believed they had been discharged. Champ's argument that the list was merely a negotiable matter is belied by the evidence that Hoy "adamantly" stated that the listed individuals would not be reinstated under any conditions, regardless of whether a contract was reached.

II

CONVERSION OF THE STRIKE

[5] Having determined that Champ discharged employees engaged in an economic strike, we must next review the evidence to determine whether this conduct converted the economic work stoppage into an unfair labor practice strike. It is undisputed that the discharge of a striking employee is an unfair labor practice under sections 8(a)(1) and (3) of the Act. See NLRB v. Kaiser Steel Corp., 700 F.2d 575, 576-77 (9th Cir. 1983) (discharge of employees for striking is an unfair labor practice).

[6] Champ contends that "even if one or both of the findings of illegal discharges is upheld, the record is devoid of evidence which supports a finding of the strike being converted." Brief for Respondent at 5-6. Champ also argues that "[t]he burden is on the General Counsel to prove that the unfair

labor practices aggravated or prolonged the strike." Id. at 6. We agree with Champ that the burden is on the General Counsel to prove that the unfair labor practices aggravated or prolonged the strike. In N.L.R.B. v. Top Manufacturing Co., Inc., 594 F.2d 223 (9th Cir. 1979), we were called upon to determine whether an economic strike had been converted into an unfair labor practice strike. Id. at 225. We began our discussion of the applicable law by stating "the controlling legal principles are not controverted." Id. Unfortunately, we cited no authority for this proposition. Instead we described the "controlling legal principles" in the following words: "A strike begun in support of economic objectives becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices." Id. By using this language to reflect "controlling legal

principles," we did not intend to adopt a new rule. To make clear what is implicit in our decision in Top, we agree with those circuits that have adopted the principle that violations of the National Labor Relations Act which aggravate or prolong an economic strike will convert it to an unfair labor practice strike. See Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1080 (1st Cir. 1981) (finding no conversion where the unfair labor practice did not prolong the strike or result in a delayed settlement); See also C-Line Express, 292 N.L.R.B. No. 63 (1989) (finding no conversion where the unfair labor practice did not cause a prolongation of the work stoppage); Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B., 718 F.2d 269 (8th Cir. 1983) (finding conversion where the unfair labor practice prolonged the strike); Facet Enterprises, Inc., v. N.L.R.B., 907 F.2d 963, 977 (10th Cir. 1990) (applying the prolong or

aggravate test and finding conversion where a strike was expanded to include a protest over unfair labor practices).

Champ's notification to the Union's principal negotiator that certain striking employees, including a member of the employees' negotiating committee, would never be rehired or reinstated "under any conditions" expanded the existing economic dispute between the parties to include the employment status of striking employees and delayed settlement of the strike. Champ knew or should have known that this direct challenge to union solidarity and collective action would cause the membership to take action to protest this unfair labor practice. The unanimous vote of the membership on November 5, 1979 to remain on strike until all strikers were reinstated should have been foreseeable to any rational employer.

Champ argues that, in determining whether there is substantial evidence to support a finding that the economic work stoppage became an unfair labor practice strike, we should consider the fact that the picket signs made no reference to the discharge of striking employees. Champ cites NLRB v. Proler International Corp., 635 F.2d 351 (5th Cir. 1981), as authority for this proposition. In Proler the court held that the evidence was insufficient to show that an economic work stoppage was converted to an unfair labor practice strike where the record showed that a company vice-president told employees that if they did not return to work they would lose their jobs. Id. at 353. The Fifth Circuit concluded that "[t]he employees did not consider themselves discharged" or threatened with job termination. Id. at 354. The court also noted that the picket signs did not list the threat of discharge or

discharge as a grievance. Id. In the instant matter, as discussed above, substantial evidence supports a finding that the union membership reasonably inferred that striking employees had been illegally discharged.

In Vulcan Hart, the employer made a similar argument concerning failure to change the picket signs. 718 F.2d at 276. Petitioner asserted that "the Union's strike remained an economic strike after November 1, because the subject matter on the picket signs remained the same, and the strikers affirmed that they would not return until the Union and V-H agreed on a contract." Id. The Court rejected this argument sub silentio and found that there was substantial evidence that the employer engaged in unfair labor practices by withdrawing recognition of the union after the workers went on strike. Id. We conclude, from the authorities cited by

Champ, that the failure to change the wording on the picket signs to show that the employer is guilty of unfair labor practices is a factor that should be considered in reviewing the record as a whole to determine whether an unfair labor practice has converted an economic work stoppage into an unfair labor practice strike. We have considered this factor. We remain persuaded that substantial evidence supports the Board's finding.

Champ also appears to argue that the economic work stoppage was not converted into an unfair labor practice strike as a result of the discharge of the striking employees because "there is no evidence that it became an issue in the negotiations," Brief for Respondent at 10, or that the membership's grievance was communicated to Champ. Id. No authority is cited for the suggestion that a union must inform an employer that his unfair labor practices have converted the work

stoppage into an unfair labor practice strike. The record shows that Champ gratuitously presented the issue of the company's refusal to rehire the discharged employees to the Union's negotiator and informed him that rehiring would not be considered under any circumstances. The impact in the pending negotiations should have been obvious to any reasonable employer. Any union's credibility with its membership would be destroyed if it condoned the discharge of a union member, who was acting as a member of the negotiating committee during an economic strike, without prolonging the strike until this grievance was resolved. No notice was required that prolongation of the strike would naturally flow from the employer's grievous unfair labor practices. Furthermore, the record shows that the Union's negotiator informed Champ's

representative that the Union could not agree to deny reinstatement to any person.

III

ALLEGED BOARD CONSIDERATION OF ALLEGATIONS OUTSIDE THE COMPLAINT

Champ claims that the Board "improperly considered allegations outside the complaint in finding a conversion of the strike to an unfair labor practice strike." Brief for Respondent at 13. The complaint alleged that the discharges described above caused the strike to be converted; it did not allege that Champ's other alleged unfair labor practices converted the economic work stoppage into an unfair labor practice strike. Champ bases its argument on the fact that the ALJ relied in part upon unfair labor practices other that the discharges. Champ contends that the Board failed to modify the ALJ's order and that therefore, "it must be assumed that the Board also relied on the

'other alleged acts'." Brief for Respondent at 15.

[7] The record does not support Champ's contention that the Board considered unfair labor practices not alleged in the complaint. We must determine whether the Board, not the ALJ, properly applied the law. Lippincott, 661 F.2d at 115. Thus, the fact that the ALJ may have improperly relied upon allegations outside the complaint is irrelevant if the Board did not do so. Our examination of the Board's decision reveals that it properly confined its review of the conversion issue to the discharge of the employees. The Board specifically stated "that the termination of each of the six employees served to convert the strike to an unfair labor practice strike." The Board made no mention of any other alleged unfair labor practices when it determined that the strike was converted. In fact, the Board determined that the strike

was converted at the November 5, 1979 Union meeting at which the discharges were discussed. We find that the Board properly confined its review to the allegations raised in the complaint. Therefore, Champ's contention that the Board improperly considered acts not alleged in the complaint is without merit.

IV

ALLEGED SUPPRESSION OF RELEVANT EVIDENCE

Champ argues that it was erroneously foreclosed from producing evidence that would demonstrate that the alleged discharge of the striking employees had no effect on prolonging the strike. The record shows that the ALJ informed Champ's counsel as follows:

> I am not going to preclude you; I can see the relevance if you want to argue that [the strike was not prolonged because of what management did], but I am going to consider the door opened [to

evidence of surface bargaining] in all fairness to you, if you do pursue that area.

In response to the court's explanation of the ruling allowing Champ's counsel to proceed with questions that would attempt to show that management's conduct did not prolong the strike, Champ's counsel stated: "Okay. Based on what you advised me, I am not going to pursue that line of questioning." Thus, contrary to Champ's assertion, the ALJ ruled that the proffered evidence was relevant and admissible.

V

THE STRIKERS' RIGHT TO IMMEDIATE REINSTATEMENT

On April 17, 1980 the Union determined that the strike was ineffective and decided to end the strike and pursue its unfair labor practice claims. On that date the Union sent a telegram to Champ making an unconditional

offer to return to work on April 21. On April 21, approximately 54 of the striking employees showed up at their regular shift to begin work. Champ, however, did not put them to work on that day. The reinstatement of the strikers did not actually begin until May 9, 1980. On that date, Champ gradually began reinstating some of the strikers. Most of the strikers had been reinstated by May 30. The remainder were not reinstated for an extended period of time.

When the striking employees arrived for work on April 21 Champ gave each of them a letter which stated: "Your union has not given us reasonable time to replace you to your job or an equivalent job. We do not have sufficient health and sanitation facilities to accept any major number of employees. For further instruction, please contact your union." Several employees all testified that Ed Simovich told them he did

not have timecards ready for their return. Simovich testified that he had three concerns that caused him to delay reinstatement. First, he was concerned with potential violence between the strikers and nonstrikers given the number of threatening confrontations and vandalism incidents that had occurred during the strike. Second, he wanted to ensure the quality of his product and was concerned about the potential for sabotage of the equipment. Finally, he cited worsening economic conditions and a desire to ensure "continuity in work in the jobs being performed."

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by failing to reinstate the strikers who had not been permanently replaced before the strike was converted into an unfair labor practice strike. The ALJ found that Champ's evidence that it delayed

reinstatement to avoid violence between the strikers and nonstrikers was not credible. Champ did not produce evidence to show that the strikers' immediate reinstatement would have created a safety hazard. The ALJ also concluded that testimony produced by Champ, that it was concerned about quality control and economic conditions, was pretextual and unworthy of consideration. The ALJ's conclusion that the only credible reason that Champ delayed reinstatement was because the strikers "engaged in protected concerted activity" is supported by substantial evidence in the record when viewed in its entirety.

Champ argues that it was justified in delaying reinstatement because of its concern for violence among the workers. The ALJ found Champ substantially added to the hostility by discharging striking employees, failing to take action against nonstrikers

for their misconduct, and "clearly exhibiting anti-union animus." Champ relies on Pacific Powder Co., 84 NLRB 280 (1949), in support of its contention that potential violence justified a delay in reinstatement. In Pacific Powder, the employer attempted to justify its refusal to reinstate striking employees immediately on the basis of hostility between strikers and nonstrikers. This argument was rejected because the employer substantially added to the hostility that existed between the nonstrikers and strikers. Id. at 290-24. Thus, Champ cites no case, nor has our research revealed any relevant authority, in which an employer's refusal to reinstate unfair labor practice strikers immediately was upheld on the basis of worker hostility.

[8] Unfair labor practice strikers are entitled to immediate reinstatement upon making an unconditional offer to return. NLRB v. International Van Lines, 409 U.S. 48,

50-51 (1972); NLRB v. Top Mfg. Co., 594 F.2d 223, 225 (9th Cir. 1979). Although economic strikers may be permanently replaced, an employer must dismiss replacement workers if necessary to make room for the returning unfair labor practice strikers. International Van Lines, 409 U.S. at 50-51; NLRB v. West Coast Casket Co., 205 F.2d 902, 908 (9th Cir. 1953). "When the striking employees ma[ke] an unconditional offer to return to their employment, [the employer] [i]s obligated to make them an unconditional offer of reinstatement." Presto Casting Co. v. NLRB, 708 F.2d 495, 499 (9th Cir.), cert. denied, 464 U.S. 994 (1983).

Substantial evidence justifies the Board's finding that Champ improperly failed to offer immediate reinstatement to the unfair labor practice strikers. Although it is true, as Champ alleges, that the strike was rife with acts of aggression, violence,

and property damage, Champ's behavior significantly contributed to the atmosphere of hostility. The record shows that Champ committed unfair labor practices by discharging economic strikers and failed to take any action against nonstriking employees for their acts of violence against strikers. Champ has failed to demonstrate that it was justified in delaying reinstatement because of a concern for potential employee violence.

VI

DISCHARGE OF PERMANENTLY REPLACED STRIKERS

Prior to November 5, 1979, the date of which the strike became an unfair labor practice strike, Champ had permanently replaced ten of the economic strikers.[3] As noted earlier, Champ was entitled to replace

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[3] The ten strikers are Antonio Andrade, Javier Arroyo, Alejandro Arroyo, David Coronado, Rick Craft, Enrique Figueroa, Lorenzo Franco, Micky Lambright, Martiniano Rodriguez, and Francisco Zamora.

the economic strikers permanently. Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1153 (9th Cir. 1986). On May 30, 1980 Champ called the ten replaced strikers into the personnel office. Champ gave each employee a letter which told the employees that they were on layoff status because no jobs were available. The letter continued, "we will place your name on a preferential hiring list at your request, which must be received by the company, in writing, no later than June 6, 1980." When asked by an employee whether signing the request forms would result in a loss of seniority, Ed Simovich said that he could not answer at that time. None of the employees returned the form.

On June 10, 1980, Champ sent the ten employees another letter, along with their accrued vacation pay. The letter stated:

> As of this date, we have not received your request to place your name

on the company's preferential hiring list. We discussed this matter with you on May 30, 1980, and gave you a preferential hiring form with a stamped and pre-addressed envelope for mailing directly to the company. We desire to know whether or not you desire to be included on the preferential hiring list so that we do not overlook you should we need additional help in the future. If you desire to be included on the preferential hiring list, we must have your request within the next several days or so, unless there is an extenuating circumstance beyond your reasonable control.

Subsequently, after receiving no reply to its letter, Champ mailed another letter to the six employees who had vested interests in the profit sharing plan returning all of their money. When the Union

inquired of Champ as to the status of these employees, Champ stated in a letter that checks were sent as a result of the employer's termination of employment. After the Union notified Champ that, in its view, Champ had discharged the employees, Champ sent a letter on September 5, 1980 requesting a return of the profit sharing checks. All but one employee returned these checks. Under the Act, permanently replaced economic strikers continue to be employees until they obtain substantially equivalent employment; Champ could not simply discharge them because there were no available jobs at the time. NLRB v. Rockwood & Co., 834 F.2d 837, 389 (9th Cir. 1987).

The Board found that Champ's actions effectively discharged the employees in violation of sections 8(a)(1) and (3) of the Act. The Board did not determine what remedy should be granted under the circumstances, in

light of Champ's September 5 letter, leaving that to the compliance stage. Champ argues that it did not discharge the ten employees. Champ contends that the only reason for remitting the profit sharing checks was because the trustee of the profit sharing plan told Champ that only active employees could participate. Thus, Champ alleges that its actions "did not emanate from any intention to terminate...these employees." Brief for Respondent at 36.

Although economic strikers may be permanently replace, they are entitled to reinstatement when and if a job opens up for which the striker is qualified. NLRB v. Fleetwood Trailor Co., 389 U.S. 375, 381 (1967); NLRB v. Rockwood & Co., 834 F.2d 837, 839 (9th Cir. 1987). Once the employee makes an unconditional offer to return to work, the employer must make an unconditional offer of reinstatement, if a job is available. "The

only obligation placed upon the striker is that he unconditionally request reinstatement." NLRB v. McQuaide, Inc., 617 F.2d 349, 354 (3d Cir. 1980). The reinstatement cannot be made conditional on signing a form. Presto Casting Co. v. NLRB, 708 F.2d at 498-99. "The Company ha[s] no right to require the employees to repeat the statement of interest [in returning to work] made by the Union." NLRB v. McQuaide, Inc., 617 F.2d at 354; see also NLRB v. Vitronic Div. of Penn Corp., 630 F.2d 561, 564-65 (8th Cir. 1979) (company could not require affirmative action on employee's part to remain on the reinstatement list; this included filling out a form).

As stated above in Part I, the test for whether a discharge has occurred is whether the words or conduct would lead a reasonable employee to believe that he or she had been discharged. See Cement Masons Local No. 555,

225 F.2d at 172. This test does not depend upon the employer's intentions, but on the reasonable employee's reaction to the employer's action.

[9] Under the facts found credible by the ALJ, substantial evidence supports the Board's finding of a discharge. Champ improperly required the employees to sign forms indicating their desire to be placed on the preferential hiring list. Although Simovich stated that this was not truly a requirement, this information was never conveyed to the employees. Later, after refusing to respond to Champ's letters, the employees received their accumulated vacation pay and profit sharing benefits. Based upon inquiry from the Union, Champ stated that the employees had been terminated. Upon these facts, a reasonable employee could believe he or she had been discharged.

VII

CHAMP'S REFUSAL TO REINSTATE STRIKERS FOR ALLEGED MISCONDUCT

[10] Champ argues that it properl refused to reinstate unfair labor practic strikers, Jose Viallavicencio, Carlo Almoroz, Joe Solis, and Ramon Rodriguez, fo strike-related misconduct.

After the strikers unconditionall offered to return to work, Champ refused t reinstate eleven of the unfair labor practic strikers, including the four mentioned above for alleged strike misconduct. Between May and May 7, 1980 Champ obtained a list o strikers with pending criminal charges fro the police department. The list containe the names of the 11 discharged strikers. O May 30, 1980 Champ requested that the person on the list report to the personnel office Champ gave each employee a letter statin "You currently have pending criminal charge

with the District Attorney's Office for STRIKE-RELATED CRIMINAL VIOLATIONS. You are therefore, ineligible for work reinstatement. Should your arrest(s) be considered false, your reinstatement will be reconsidered at that time." Ed Simovich instructed the strikers that they clear up their records before they could be reinstated. At this time, Champ made no mention of any strike-related misconduct other than that which resulted in criminal charges. In fact, Champ failed to mention any other misconduct until the hearing before the ALJ.

On June 6, 1980, Champ sent another letter to the group indicating that they were on indefinite suspension status. The letter stated "[w]e are looking deeply into your pending criminal charges which resulted from your arrest(s) for strike-related violence." On October 31, 1980 Champ sent a final letter to Villavicencio, Almoroz, and Rodriguez

stating that they had been terminated fo "strike-related criminal violence." Th letter made no mention of any misconduc other than the pending criminal charges.

Based upon these facts, the AL concluded that Champ improperly refused t reinstate the strikers. The ALJ provide several reasons for this holding. The AL found that the only reason provided by Cham up until the time of the hearing for refusin to reinstate the employees was that crimina charges were pending against them. Champ ha not relied upon any of the other alleged act of misconduct. The ALJ concluded tha Champ's delay in bringing up conduc unrelated to the pending criminal charge demonstrated Champ's lack of good faith i discharging the strikers. In addition, th ALJ found that Champ condoned the misconduc and engaged in discriminatory practices b failing to take action against nonstrikin

employees for their misconduct, and by offering to reinstate the strikers on October 30, thereby condoning all acts prior to that date. Finally, the ALJ credited the strikers' testimony that they did not engage in serious misconduct after October 30, 1979, and also determined that the strikers did not commit the acts of misconduct that resulted in arrests. The ALJ expressly found that the testimony of Champ's witnesses was not credible. The ALJ also determined that Champ displayed anti-union animus in its actions.

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by refusing to reinstate the strikers. The Board found that the only grounds for denying reinstatement were the pending criminal charges. The Board noted that Champ failed to mention any other reason for denying reinstatement until the hearing before the ALJ. The Board also found that

none of the employees were guilty of the misconduct described in the criminal charges.

"Striking employees who engage in serious picket line misconduct forfeit the protection of the Act and may be discharged for such conduct." General Teamsters Local No. 162 v. NLRB, 782 F.2d 839, 841 (9th Cir. 1986). Once the General Counsel has made a prima facia showing of violation of the Act by demonstrating that an employee was discharged for conduct occurring during a strike, "[t]he employer may defend the discharge on the ground that it had 'an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature' and that the discharge decision was based on that misconduct." Id. (quoting General Tel. Co. of Mich. 251 NLRB 737, 738 (1980) (emphasis added), enforced, 672 F.2d 894 (D.C. Cir. 1981)). Once an employer makes this showing, "the General Counsel must

then affirmatively show that the employee did not in fact engage in such conduct." General Teamster, 782 F.2d at 841-42; accord General Tel. Co. of Mich., 251 NLRB at 738-39. If it is found that the employee did not engage in the conduct, he cannot be discharged regardless of the employer's good faith belief. NLRB v. Burnup and Sims, Inc., 379 U.S. 21, 23 (1964).

Substantial evidence support the Board's determination that Champ did not act in good faith in refusing to reinstate the strikers. The fact that Champ never mentioned any misconduct other than the pending criminal charges up until the time of the hearing supports the Board's finding that Champ only relied on the pending criminal charges when it discharged the strikers. The Board's decision is also supported by the fact that Champ only refused to reinstate employees

with pending criminal charges, and did not look into misconduct by any other employee.

Substantial evidence supports the Board's decision that none of the conduct underlying the pending criminal charges in fact occurred. The ALJ credited the testimony of Villavicencio, Almaroz, Solis, and Rodriguez that they did not engage in the misconduct that resulted in criminal charges. The ALJ did not believe the testimony of Champ's witnesses concerning these incidents. All of the criminal charges were dropped with the exception of those against Villavicencio, who pleaded nolo contendere to blocking a vehicular crossing. Champ has not shown by a clear preponderance of the evidence that the ALJ's credibility determinations should be rejected. Lippincott Indus., Inc., 661 F.2d at 114. Because the General Counsel has demonstrated that the misconduct in question did not in fact occur, Champ's refusal to

reinstate these employees constitutes an unfair labor practice. See Burnup & Sims, 379 U.S. at 23 (an employer may not discharge an employee for misconduct that did not occur even if the employer had a good faith belief that such misconduct occurred). Because we conclude that the discharge of the employees was based on the existence of criminal charges that were not proved, we need not address the Union's argument that Champ condoned the strikers' misconduct or subjected them to disparate treatment.

VIII

CONCLUSION

The Board's order is supported by substantial evidence and we therefore grant enforcement.

ENFORCEMENT GRANTED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	No. 89-70160
Petitioner,	NLRB Nos. 21-CA-18696 21-CA-19007 21-CA-19423 21-CA-19424
v.	
CHAMP CORPORATION,	OPINION
Respondent.	

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted

June 8, 1990-Pasadena, California

Filed August 29, 1990

Before: Arthur L. Alarcon, Melvin Brunetti and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Alarcon

OPINION

ALARCON, Circuit Judge:

The National Labor Relations Board (Board) has applied to this court for enforcement of its Decision and Order entered on November 25, 1988. The Board found that Champ Corporation (Champ) committed unfair labor practices by discharging employees while they conducted an economic strike. The Board concluded that these unfair labor practices converted the employees' economic work stoppage into an unfair labor practice strike. As a result, the Board ordered, inter alia, that Champ cease and desist all unfair labor practices and reinstate all striking employees with backpay from the date of their unconditional offer to return to work.

Champ contends that substantial evidence does not support the Board's finding that any striking employees were fired during the economic strike. Champ also argues that the Board erred as a matter of law in

concluding that the alleged discharge of the employees converted an economic work stoppage into an unfair labor practice strike.

The primary issue we must decide is whether Champ's conduct in discharging certain striking employees converted an economic work stoppage into an unfair labor practice strike by expanding the issues in dispute to include a protest regarding the company's alleged unfair labor practices. We conclude that the Board's finding that economic strikers were discharged is supported by substantial evidence and that this conduct became a contributing factor in expanding the issues in this labor dispute. We discuss each issue and the facts pertinent thereto under separate headings.

I

SUBSTANTIAL EVIDENCE OF UNFAIR LABOR PRACTICES

Champ asserts that the Board's finding that the company was guilty of unfair labor practices because certain employees were discharged on or before October 25, 1979 is not supported by substantial evidence. We disagree.

We must uphold the Board's decision if its factual findings are supported by substantial evidence and if it has correctly applied the law. N.L.R.B. v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1989); Lippincott Indus., Inc. v. N.L.R.B., 661 F.2d 112, 114 (9th Cir. 1981). If there is evidence to support two conflicting views, the Board's findings must be allowed to stand even though we might have reached a different conclusion on our own. N.L.R.B. v. Pacific Grinding Wheel Co., 572 F.2d 1343, 1347 (9th

Cir. 1978). Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows they are incorrect. Lippincott, 661 F.2d at 114.

A. The Discharge of Baugh and Naranjo

Because contract negotiations reached an impasse on economic issues, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America - UAW, No. 509 (the Union) ordered a work stoppage on October 15,1979. Prior to that date, on October 3, 1979, Tom Simovich, Champ's general manager, presented a list to a deputy sheriff containing the names of nine employees. Simovich told the officer that these employees might cause problems in the event of a strike. Steven Baugh's name was on the list.

On October 17,1979, Baugh and Jose Naranjo were picketing in front of one of

Champ's buildings. Tom Simovich came out of the building and spoke to Naranjo. He told Naranjo that "he might as well go home" because he "didn't work here anymore." Baugh said "what about me, Tom?" and Simovich replied "[y]ou're fired, too. You might as well go home." Simovich then told Baugh and Naranjo that he would have them arrested if they did not leave. Baugh asked Simovichwhy he was fired but Simovich did not reply. Baugh then told Simovich, "[w]e still love you, Tom. We just want a contract." Simovich testified that he had had no conversation with Baugh or Naranjo during the first week of the strike. The ALJ found that Simovich's testimony was not credible.

The Board concluded that the testimony of Baugh and Naranjo was sufficient to show that they were discharged in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §

158(a)(1), (3) (the Act).[4] The Board stated that "Simovich's remarks were entirely unequivocal in character, were phrased as an immediate discharge, were accompanied by a direction to leave the employment site with a concurrent threat of arrest, and were uttered by a high management official so as to lend credence to the finality of the action taken."

Champ contends that there is substantial evidence in the record that supports a finding that Baugh and Naranjo did

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[4] § 158. Unfair labor practices
a) It shall be an unfair labor practice for an employer
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(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . 29 U.S.C. § 158(a)(1),(3)(1988).

not believe that they had been discharged. Champ characterizes the conversation among Simovich, Baugh, and Naranjo as a jovial, facetious exchange. As further proof that no discharge occurred, Champ notes that Baugh and Naranjo continued picketing and reported for reinstatement on April 21, 1980, and that Baugh continued serving as a member of the Union's negotiating team. In addition, Champ contends that the letter sent to all striking employees on October 30,1979 requesting them to return to work demonstrates that Baugh and Naranjo were not discharged on October 17, 1979.[5]

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[5] The letter reads as follows:

We have been waiting patiently for you to return to your job and we shall continue to do so until Friday morning, November 2, at 8 a.m.

If you choose to keep your job, drive in the gate where the
guards are just south of the company's main office and go to the
personnel office - you will be put to work immediately.

(continued...)

"No set words are necessary to constitute a discharge; words or conduct, which would logically lead an employee to believe his tenure had been terminated, are in themselves sufficient." N.L.R.B. v. Cement Masons Local No. 555, 225 F.2d 168, 172 (9th Cir. 1955). "The test of whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer." Pennypower Shopping News, Inc. v.

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[5](...continued)

There is plenty of work and CHAMP will continue to operate!

If you choose not to return to your job, you may Lose Your Job Entirely! The company is not continuing the health and life insurance of persons not working - if you want to keep your health and life insurance protection for you and your family, you may do so by calling (213) 444-9561 for instructions.

We do hope that you will give very careful consideration to this opportunity and to your future, and return to work now!

N.L.R.B., 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in original); accord N.L.R.B. v. Downslope Indus., Inc., 676 F.2d 1114, 1118 (6th Cir. 1982); N.L.R.B. v. Ridgeway Trucking Co., 622 F.2d 1222, 1224 (5th Cir. 1980) (per curiam); N.L.R.B. v. Trumbull Asphalt Co., 327 F.2d 841, 843 (8th Cir. 1964). In Health Enterprises of America, Inc., 273 NLRB, 1196 (1984), the Board held that a top management official could be taken at his word when he told an employee that he was fired. Id. at 1204. In Trident Recycling Corp., 282 NLRB 1255 (1987), the Board stated that it must view the evidence through the strikers' eyes. Id. at 1260. "Each case requires an examination of the facts." Id.

Simovich's statements that Baugh and Naranjo were "fired" and "might as well go home" would lead reasonable workers to believe they had been discharged. As a high management official, Simovich had the power

to discharge employees; the employees were entitled to take Simovich at his word. Health Enters. of Am., Inc., 273 NLRB at 1204. Simovich backed up these statements by threatening to have Baugh and Naranjo arrested if they did not leave. Champ has made no showing that the ALJ's credibility determinations were erroneous. See Lippincott, 661 F.2d at 114 (deference must be given to a ALJ's credibility determinations absent a clear preponderance of the evidence to the contrary).

The fact that Baugh and Naranjo continued picketing and that Champ subsequently reinstated them after the Union agreed to terminate the strike does not alter our conclusion that it was reasonable for them to believe that they were discharged on October 17,1979. It is not unusual for an employee who has been unlawfully discharged for union activity to continue to picket. In

Health Enterprises of America, Inc., 273 NLRB 1196 (1984), the Board concluded that a discharged employee's continued picketing did not alter the fact of his discharge. Id. at 1203-04. The fact that Baugh and Naranjo presented themselves for reinstatement does not demonstrate it was unreasonable for them to believe that on October 17,1979 they had been discharged. See Pennypower Shopping News, 726 F.2d at 630 (holding that subsequent reinstatement did not alter a finding of discharge where that employer had created ambiguity as to its employees' status); Central Broadcast Co., 280 NLRB 501, 504 (1986) (holding that a subsequent reinstatement did not alter the fact that a discharge took place).

B. The Discharge of Valenzuela, Solis, Gutierrez and Ortiz

On October 25, 1979, Champ's negotiator, Edmund Hoy, Jr., met with Ralph

Gazzigli, the Union's negotiator. Hoy handed Gazzigli a list, prepared by Tom Simovich, containing the names of Steve Baugh, Heriberto Valenzuela, Joe Solis, Ruben Gutierrez, and Eduardo Ortiz. Hoy informed Gazzigli "very adamantly" that the individuals on the list "would never be rehired, or reinstated under any conditions." Gazzigli informed Hoy that he could not negotiate away any employee's job and handed the list back to Champ's negotiator. Gazzigli testified that he told Hoy "there was no way I could negotiate, or agree to single out any persons as far as negotiating the job away . . . I couldn't do that, I wouldn't do it." Prior to giving back the list, Gazzigli read all of the names on the list.

At a subsequent negotiating session, on October 31, 1979, Hoy again attempted to present the list to Gazzigli.

Tom Simovich, Steve Baugh, and a federal mediator were also present. Hoy stated that he wanted to present the list containing the names of individuals who would not be rehired under any circumstances, regardless of whether a contract was formed. Gazzigli again informed Hoy that he would not negotiate anyone's job away. He cautioned Hoy against formally presenting the list. The mediator intervened. The list was never formally presented at the negotiating session. Baugh saw his name on the list when it was placed on the table by Hoy.

The Board concluded that each of the employees named in the list had been discharged by Champ. The Board determined that the employment status of these individuals had been removed by Champ as a negotiable matter, thereby "effectively implementing their discharges." The Board further stated that "Hoy's characterization

of the employment tenure of the employees on the list was clear and unambiguous: they would 'never' resume their employment 'under any conditions.'"

Champ argues that the employees on the list were not discharged. First, Champ claims that "there is no credible evidence" that the employees knew their names were on the list. Second, Champ contends that the list was presented as a negotiable matter, not as "a firm and final decision."

As discussed above, the test for determining if Valenzuela, Solis, Gutierrez, and Ortiz were discharged is whether a reasonable employee would have believed he was terminated by the employer's conduct. NLRB v. Cement Masons Local No. 555, 225 F.2d at 172. An employee must be aware of the employer's actions, otherwise he would have no basis for inferring his employment had been terminated. See Health Enters. of Am.

Inc., 273 NLRB 1196, 1204 (1984) (finding no discharge where neither employees nor union was aware that employer had stamped "terminated" on timecards).

The record shows that Gazzigli, the Union negotiator, saw all of the names on the list. Baugh also saw Joe Solis' name on the list. On November 5, 1979, at a Union meeting, Baugh and Gazzigli discussed the no reinstatement list with all the Union members. The evidence shows that the discharge issue dominated all of the discussion at the proceedings at the Union meeting. Accordingly, substantial evidence exists to demonstrate that the striking employees were aware of Champ's actions. See Martin Arsham Sewing Co., 244 NLRB 918, 918 (1979) (Board held discharge had occurred where union officials were aware of company's conduct and communicated that information to the employees).

We hold that Champ's conduct in showing the list to Union officials and stating unequivocally that the listed employees would never be reinstated regardless of whether a contract was reached, was substantial evidence demonstrating that the named employees reasonably believed they had been discharged. Champ's argument that the list was merely a negotiable matter is belied by the evidence that Hoy "adamantly" stated that the listed individuals would not be reinstated under any conditions, regardless of whether a contract was reached.

II

CONVERSION OF THE STRIKE

Having determined that Champ discharged employees engaged in an economic strike, we must next review the evidence to determine whether this conduct converted the economic work stoppage into an unfair labor practice strike. It is undisputed that the

discharge of a striking employee is an unfair labor practice under sections 8(a)(1) and (3) of the Act. See N.L.R.B. v. Kaiser Steel Corp., 700 F.2d 575, 576-77 (9th Cir. 1983) (discharge of employees for striking is an unfair labor practice).

Champ contends that "even if one or both of the findings of illegal discharges is upheld, the record is devoid of evidence which supports a finding of the strike being converted." Brief for Respondent at 5-6. Champ also argues that "[t]he burden is on the General Counsel to prove that the unfair labor practices aggravated or prolonged the strike." Id. at 6. Champ has failed to cite or discuss any cases from this circuit for this proposition. As a panel of this court, we are required to follow the law of this circuit concerning the test to be applied to determine whether an economic work stoppage was converted into an unfair labor practice

strike. See Taylor v. Burlington Northern R.R. Co., 787 F.2d 1309, 1313 (9th Cir. 1986) (a three-judge panel must follow Ninth Circuit precedent). In N.L.R.B. v. Top Manufacturing Company, Inc., 594 F.2d 223(9th Cir. 1979), we explained the applicable rule in the following words: "A strike begun in support of economic objectives becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices." Id. at 225; see also Facet Enter., Inc. v. N.L.R.B., No. 88-2268, slip op. at 27 (10th Cir. July 3, 1990) (finding conversion where a strike was expanded to include a protest over unfair labor practices).

Champ's notification to the Union's principal negotiator that certain striking employees, including a member of the employees' negotiating committee, would never be rehired or reinstated "under any

conditions" expanded the existing economic dispute between the parties to include the employment status of striking employees. Champ knew or should have known that this direct challenge to union solidarity and collective action would cause the membership to take action to protest this unfair labor practice. The unanimous vote of the membership on November 5,1979 to remain on strike until all strikers were reinstated should have been foreseeable to any rational employer.

Champ asserts that the test that should be applied in determining whether a conversion occurred is that expressed in Vulcan Hart Corp. v. N.L.R.B., 718 F.2d 269 (8th Cir. 1983). In Vulcan Hart, the Eighth Circuit stated: "In order for an economic strike to be converted to an unfair labor practices strike, the employer's unfair labor practices must aggravate or prolong the

strike." Id. at 276. To the extent that the Eighth Circuit's rule differs from our expansion of the dispute test set forth in Top Manufacturing, 594 F.2d at 225, we must adhere to the law of this circuit.

Champ argues that, in determining whether there is substantial evidence to support a finding that the economic work stoppage became an unfair labor practice strike, we should consider the fact that the picket signs made no reference to the discharge of striking employees. Champ cites N.L.R.B. v. Proler International Corp., 635 F.2d 351 (5th Cir. 1981), as authority for this proposition. In Proler the court held that the evidence was insufficient to show that an economic work stoppage was converted to an unfair labor practice strike where the record showed that a company vice-president told employees that if they did not return to work they would lose their jobs. Id. at 353.

The Fifth Circuit concluded that "[t]he employees did not consider themselves discharged" or threatened with job termination. Id. at 354. The court also noted that the picket signs did not list the threat of discharge or discharge as a grievance. Id. In the instant matter, as discussed above, substantial evidence supports a finding that the union membership reasonably inferred that striking employees had been illegally discharged.

In Vulcan Hart, the employer made a similar argument concerning failure to change the picket signs. 718 F.2d at 276. Petitioner asserted that "the Union's strike remained an economic strike after November 1, because the subject matter on the picket signs remained the same, and the strikers affirmed that they would not return until the Union and V-H agreed on a contract." Id. The Court rejected this argument sub silentio

and found that there was substantial evidence that the employer engaged in unfair labor practices by withdrawing recognition of the union after the workers went on strike. Id. We conclude, from the authorities cited by Champ, that the failure to change the wording on the picket signs to show that the employer is guilty of unfair labor practices is a factor that should be considered in reviewing the record as a whole to determine whether an unfair labor practice has converted an economic work stoppage into an unfair labor practice strike. We have considered this factor. We remain persuaded that substantial evidence supports the Board's finding.

Champ also appears to argue that the economic work stoppage was not converted into an unfair labor practice strike as a result of the discharge of the striking employees because "there is no evidence that it became an issue in the negotiations,"

Brief for Respondent at 10, or that the membership's grievance was communicated to Champ. Id. No authority is cited for the suggestion that a union must inform an employer that his unfair labor practices have converted the work stoppage into an unfair labor practice strike. The record shows that Champ gratuitously presented the issue of the company's refusal to rehire the discharged employees to the Union's negotiator and informed him that rehiring would not be considered under any circumstances. The impact in the pending negotiations should have been obvious to any reasonable employer. Any union's credibility with its membership would be destroyed if it condoned the discharge of a union member, who was acting as a member of the negotiating committee during an economic strike, without prolonging the strike until this grievance was resolved. No notice was required that prolongation of

the strike would naturally flow from the employer's grievous unfair labor practices. Furthermore, the record shows that the Union's negotiator informed Champ's representative that the Union could not agree to deny reinstatement to any person.

III

ALLEGED BOARD CONSIDERATION OF ALLEGATIONS OUTSIDE THE COMPLAINT

Champ claims that the Board "improperly considered allegations outside the complaint in finding a conversion of the strike to an unfair labor practice strike." Brief for Respondent at 13. The complaint alleged that the discharges described above caused the strike to be converted; it did not allege that Champ's other alleged unfair labor practices converted the economic work stoppage into an unfair labor practice strike. Champ bases its argument on the fact that the ALJ relied in part upon unfair labor

practices other than the discharges. Champ contends that the Board failed to modify the ALJ's order and that, therefore, "it must be assumed that the Board also relied on the 'other alleged acts'." Brief for Respondent at 15.

The record does not support Champ's contention that the Board considered unfair labor practices not alleged in the complaint. We must determine whether the Board, not the ALJ, properly applied the law. Lippincott, 661 F.2d at 115. Thus, the fact that the ALJ may have improperly relied upon allegations outside the complaint is irrelevant if the Board did not do so. Our examination of the Board's decision reveals that it properly confined its review of the conversion issue to the discharge of the employees. The Board specifically stated "that the termination of each of the six employees served to convert the strike to an unfair labor practice

strike." The Board made no mention of any other alleged unfair labor practices when it determined that the strike was converted. In fact, the Board determined that the strike was converted at the November 5, 1979 Union meeting at which the discharges were discussed. We find that the Board properly confined its review to the allegations raised in the complaint. Therefore, Champ's contention that the Board improperly considered acts not alleged in the complaint is without merit.

IV

ALLEGED SUPPRESSION OF RELEVANT EVIDENCE

Champ argues that it was erroneously foreclosed from producing evidence that would demonstrate that the alleged discharge of the striking employees had no effect on prolonging the strike. The record shows that the ALJ informed Champ's counsel as follows:

> I am not going to preclude you; I can see the relevance if you want to argue that [the strike was not prolonged because of what management did], but I am going to consider the door opened [to evidence of surface bargaining] in all fairness to you, if you do pursue that area.

In response to the court's explanation of the ruling allowing Champ's counsel to proceed with questions that would attempt to show that management's conduct did not prolong the strike, Champ's counsel stated: "Okay. Based on what you advised me, I am not going to pursue that line of questioning." Thus, contrary to Champ's assertion, the ALJ ruled that the proffered evidence was relevant and admissible.

V

THE STRIKERS' RIGHT TO IMMEDIATE REINSTATEMENT

On April 17,1980 the Union determined that the strike was ineffective and decided to end the strike and pursue its unfair labor practice claims. On that date the Union sent a telegram to Champ making an unconditional offer to return to work on April 21. On April 21, approximately 54 of the striking employees showed up at their regular shift to begin work. Champ, however, did not put them to work on that day. The reinstatement of the strikers did not actually begin until May 9, 1980. On that date, Champ gradually began reinstating some of the strikers. Most of the strikers had been reinstated by May 30. The remainder were not reinstated for an extended period of time.

When the striking employees arrived for work on April 21 Champ gave each of them a letter which stated: "Your union has not given us reasonable time to replace you to your job or an equivalent job. We do not have sufficient health and sanitation facilities to accept any major number of employees. For further instruction, please contact your union." Several employees also testified that Ed Simovich told them he did not have timecards ready for their return. Simovich testified that he had three concerns that caused him to delay reinstatement. First, he was concerned with potential violence between the strikers and nonstrikers given the number of threatening confrontations and vandalism incidents that had occurred during the strike. Second, he wanted to ensure the quality of his product and was concerned about the potential for sabotage of the equipment. Finally, he cited

worsening economic conditions and a desire to ensure "continuity in work in the jobs being performed."

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by failing to reinstate the strikers who had not been permanently replaced before the strike was converted into an unfair labor practice strike. The ALJ found that Champ's evidence that it delayed reinstatement to avoid violence between the strikers and nonstrikers was not credible. Champ did not produce evidence to show that the strikers' immediate reinstatement would have created a safety hazard. The ALJ also concluded that testimony produced by Champ, that it was concerned about quality control and economic conditions, was pretextual and unworthy of consideration. The ALJ's conclusion that the only credible reason that Champ delayed

reinstatement was because the strikers "engaged in protected concerted activity" is supported by substantial evidence in the record when viewed in its entirety.

Champ argues that it was justified in delaying reinstatement because of its concern for violence among the workers. The ALJ found Champ substantially added to the hostility by discharging striking employees, failing to take action against nonstrikers for their misconduct, and "clearly exhibiting antiunion animus." Champ relies on Pacific Powder Co., 84 NLRB 280 (1949), in support of its contention that potential violence justified a delay in reinstatement. In Pacific Powder, the employer attempted to justify its refusal to reinstate striking employees immediately on the basis of hostility between strikers and nonstrikers. This argument was rejected because the employer substantially added to the hostility

that existed between the nonstrikers and strikers. Id. at 290-24. Thus, Champ cites no case, nor has our research revealed any relevant authority, in which an employer's refusal to reinstate unfair labor practice strikers immediately was upheld on the basis of worker hostility.

Unfair labor practice strikers are entitled to immediate reinstatement upon making an unconditional offer to return. N.L.R.B. v. International Van Lines, 409 U.S. 48, 50-51 (1972); N.L.R.B. v. Top Mfg. Co., 594 F.2d 223, 225 (9th Cir. 1979). Although economic strikers may be permanently replaced, an employer must dismiss replacement workers if necessary to make room for the returning unfair labor practice strikers. International Van Lines, 409 U.S. at 50-51; N.L.R.B. v. West Coast Casket Co., 205 F.2d 902, 908 (9th Cir. 1953). "When the striking employees ma[ke) an unconditional

offer to return to their employment, [the employer] [i]s obligated to make them an unconditional offer of reinstatement." Presto Casting Co. v. N.L.R.B., 708 F.2d 495, 499 (9th Cir.), cert. denied, 464 U.S. 994 (1983).

Substantial evidence justifies the Board's finding that Champ improperly failed to offer immediate reinstatement to the unfair labor practice strikers. Although it is true, as Champ alleges, that the strike was rife with acts of aggression, violence, and property damage, Champ's behavior significantly contributed to the atmosphere of hostility. The record shows that Champ committed unfair labor practices by discharging economic strikers and failed to take any action against nonstriking employees for their acts of violence against strikers. Champ has failed to demonstrate that it was

justified in delaying reinstatement because of a concern for potential employee violence.

VI

DISCHARGE OF PERMANENTLY REPLACED STRIKERS

Prior to November 5, 1979, the date on which the strike became an unfair labor practice strike, Champ had permanently replaced ten of the economic strikers.[6] As noted earlier, Champ was entitled to replace the economic strikers permanently. Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1153 (9th Cir. 1986). On May 30, 1980 Champ called the ten replaced strikers into the personnel office. Champ gave each employee a letter which told the employees that they were on layoff status because no jobs were

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[6] The ten strikers are Antonio Andrade, Javier Arroyo, Alejandro Arroyo, David Coronado, Rick Craft, Enrique Figueroa, Lorenzo Franco, Micky Lambright, Martiniano Rodriguez, and Francisco Zamora.

available. The letter continued, "we will place your name on a preferential hiring list at your request, which must be received by the company, in writing, no later than June 6, 1980." When asked by an employee whether signing the request forms would result in a loss of seniority, Ed Simovich said that he could not answer at that time. None of the employees returned the form.

On June 10, 1980, Champ sent the ten employees another letter, along with their accrued vacation pay. The letter stated:

> As of this date, we have not received your request to place your name on the company's preferential hiring list. We discussed this matter with you on May 30, 1980, and gave you a preferential hiring form with a stamped and pre-addressed envelope for mailing

directly to the company. We desire to know whether or not you desire to be included on the preferential hiring list so that we do not overlook you should we need additional help in the future. If you desire to be included on the preferential hiring list, we must have your request within the next several days or so, unless there is an extenuating circumstance beyond your reasonable-control.

Subsequently, after receiving no reply to its letter, Champ mailed another letter to the six employees who had vested interests in the profit sharing plan returning all of their money. When the Union inquired of Champ as to the status of these employees, Champ stated in a letter that checks were sent as a result of the employer's termination of employment. After

the Union notified Champ that, in its view, Champ had discharged the employees, Champ sent a letter on September 5, 1980 requesting a return of the profit sharing checks. All but one employee returned these checks. Under the Act, permanently replaced economic strikers continue to be employees until they obtain substantially equivalent employment; Champ could not simply discharge them because there were no available jobs at the time. N.L.R.B. v. Rockwood & Co., 834 F.2d 837, 389 (9th Cir. 1987).

The Board found that Champ's actions effectively discharged the employees in violation of sections 8(a)(1) and (3) of the Act. The Board did not determine what remedy should be granted under the circumstances, in light of Champ's September 5 letter, leaving that to the compliance stage. Champ argues that it did not discharge the ten employees. Champ contends

that the only reason for remitting the profit sharing checks was because the trustee of the profit sharing plan told Champ that only active employees could participate. Thus, Champ alleges that its actions "did not emanate from any intention to terminate ... these employees." Brief for Respondent at 36.

Although economic strikers may be permanently replaced, they are entitled to reinstatement when and if a job opens up for which the striker is qualified. N.L.R.B. v. Fleetwood Trailor Co., 389 U.S. 375, 381 (1967); N.L.R.B. v. Rockwood & Co., 834 F.2d 837, 839 (9th Cir. 1987). Once the employee makes an unconditional offer to return to work, the employer must make an unconditional offer of reinstatement, if a job is available. "The only obligation placed upon the striker is that he unconditionally request reinstatement." N.L.R.B. v.

McQuaide, Inc., 617 F.2d 349, 354 (3d Cir. 1980). The reinstatement cannot be made conditional on signing a form. Presto Casting Co. v. N.L.R.B., 708 F.2d at 498-99. "The Company ha[s] no right to require the employees to repeat the statement of interest [in returning to work] made by the Union." N.L.R.B. v. McQuaide, Inc., 617 F.2d at 354; see also N.L.R.B. v. Vitronic Div. of Penn Corp., 630 F.2d 561, 564-65 (8th Cir. 1979) (company could not require affirmative action on employee's part to remain on the reinstatement list; this included filling out a form).

As stated above in Part I, the test for whether a discharge has occurred is whether the words or conduct would lead a reasonable employee to believe that he or she had been discharged. See Cement Masons Local No. 555, 225 F.2d at 172. This test does not depend upon the employer's intentions, but on

the reasonable employee's reaction to the employer's action.

Under the facts found credible by the ALJ, substantial evidence supports the Board's finding of a discharge. Champ improperly required the employees to sign forms indicating their desire to be placed on the preferential hiring list. Although Simovich stated that this was not truly a requirement, this information was never conveyed to the employees. Later, after refusing to respond to Champ's letters, the employees received their accumulated vacation pay and profit sharing benefits. Based upon inquiry from the Union, champ stated that the employees had been terminated. Upon these facts, a reasonable employee could believe he or she had been discharged.

CHAMP'S REFUSAL TO REINSTATE STRIKERS FOR ALLEGED MISCONDUCT

Champ argues that it properly refused to reinstate unfair labor practice strikers, Jose Villavicencio, Carlos Almoroz, Joe Solis, and Ramon Rodriguez, for strike-related misconduct.

After the strikers unconditionally offered to return to work, Champ refused to reinstate eleven of the unfair labor practice strikers, including the four mentioned above, for alleged strike misconduct. Between May 5 and May 7, 1980 Champ obtained a list of strikers with pending criminal charges from the police department. The list contained the names of the 11 discharged strikers. On May 30, 1980 Champ requested that the persons on the list report to the personnel office. Champ gave each employee a letter stating "You currently have pending criminal charges with the District Attorney's Office for

STRIKE-RELATED CRIMINAL VIOLATIONS. You are therefore, ineligible for work reinstatement. Should your arrest(s) be considered false, your reinstatement will be reconsidered at that time." Ed Simovich instructed the strikers that they clear up their records before they could be reinstated. At this time, Champ made no mention of any strike-related misconduct other than that which resulted in criminal charges. In fact, Champ failed to mention any other misconduct until the hearing before the ALJ.

On June 6, 1980, Champ sent another letter to the group indicating that they were on indefinite suspension status. The letter stated [w]e are looking deeply into your pending criminal charges which resulted from your arrest(s) for strike-related violence." On October 31, 1980 Champ sent a final letter to Villavicencio, Almoroz, and Rodriguez stating that they had been terminated for

"strike-related criminal violence." The letter made no mention of any misconduct other than the pending criminal charges.

Based upon these facts, the ALJ concluded that Champ improperly refused to reinstate the strikers. The ALJ provided several reasons for this holding. The ALJ found that the only reason provided by Champ up until the time of the hearing for refusing to reinstate the employees was that criminal charges were pending against them. Champ had not relied upon any of the other alleged acts of misconduct: The ALJ concluded that Champ's delay in bringing up conduct unrelated to the pending criminal charges demonstrated Champ's lack of good faith in discharging the strikers. In addition, the ALJ found that Champ condoned the misconduct and engaged in discriminatory practices by failing to take action against nonstriking employees for their misconduct, and by

offering to reinstate the strikers on October 30, thereby condoning all acts prior to that date. Finally, the ALJ credited the strikers' testimony that they did not engage in serious misconduct after October 30, 1979, and also determined that the strikers did not commit the acts of misconduct that resulted in arrests. The ALJ expressly found that the testimony of Champ's witnesses was not credible. The ALJ also determined that Champ displayed anti-union animus in its actions.

The Board upheld the ALJ's conclusion that Champ violated sections 8(a)(1) and (3) of the Act by refusing to reinstate the strikers. The Board found that the only grounds for denying reinstatement were the pending criminal charges. The Board noted that Champ failed to mention any other reason for denying reinstatement until the hearing before the ALJ. The Board also found

that none of the employees were guilty of the misconduct described in the criminal charges.

"Striking employees who engage in serious picket line misconduct forfeit the protection of the Act and may be discharged for such conduct." General Teamsters Local No. 162 v. NLRB, 782 F.2d 839, 841 (9th Cir. 1986). Once the General Counsel has made a prima facie showing of violation of the Act by demonstrating that an employee was discharged for conduct occurring during a strike, "[t]he employer may defend the discharge on the ground that it had 'an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature' and that the discharge decision was based on that misconduct." Id. (quoting General Tel. Co. of Mich., 251 NLRB 737, 738 (1980) (emphasis added), enforced, 672 F.2d 894 (D.C. Cir. 1981)). Once an employer makes this showing, "the General Counsel must then

affirmatively show that the employee did not in fact engage in such conduct." General Teamsters, 782 F.2d at 841-42; accord General Tel. Co. of Mich., 251 NLRB at 738-39. If it is found that the employee did not engage in the conduct, he cannot be discharged regardless of the employer's good faith belief. N.L.R.B. v. Burnup and Sims, Inc., 379 U.S. 21, 23 (1964).

Substantial evidence supports the Board's determination that Champ did not act in good faith in refusing to reinstate the strikers. The fact that Champ never mentioned any misconduct other than the pending criminal charges up until the time of the hearing supports the Board's finding that Champ only relied on the pending criminal charges when it discharged the strikers. The Board's decision is also supported by the fact that Champ only refused to reinstate employees with pending criminal charges, and

did not look into misconduct by any other employee.

Substantial evidence supports the Board's decision that none of the conduct underlying the pending criminal charges in fact occurred. The ALJ credited the testimony of Villavicencio, Almaroz, Solis, and Rodriguez that they did not engage in the misconduct that resulted in criminal charges. The ALJ did not believe the testimony of Champ's witnesses concerning these incidents. All of the criminal charges were dropped with the exception of those against Villavicencio, who pleaded nolo contendere to blocking a vehicular crossing. Champ has not shown by a clear preponderance of the evidence that the ALJ's credibility determinations should be rejected. Lippincott Indus., Inc., 661 F.2d at 114. Because the General Counsel has demonstrated that the misconduct in question did not in fact occur, Champ's refusal to

reinstate these employees constitutes an unfair labor practice. See Burnup & Sims, 379 U.S. at 23 (an employer may not discharge an employee for misconduct that did not occur even if the employer had a good faith belief that such misconduct occurred). Because we conclude that the discharge of the employees was based on the existence of criminal charges that were not proved, we need not address the Union's argument that Champ condoned the strikers' misconduct or subjected them to disparate treatment.

VIII

CONCLUSION

The Board's order is supported by substantial evidence and we therefore grant enforcement.

ENFORCEMENT GRANTED.

291 NLRB No. 119

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHAMP CORPORATION

and

Cases 21-CA-18696
21-CA-19007
21-CA-19423
21-CA-19424

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA--UAW;
AND INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA--UAW,
LOCAL 509

DECISION AND ORDER

On February 4, 1982 Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions, a supporting brief, and an answering brief to the Respondent's exceptions, and the Charging Party filed cross-exceptions and a brief in support of

its cross-exceptions and in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings, findings,[7] and conclusions,[8] as

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[7] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Nor do we find any merit to the Respondent's contention that the judge was biased and prejudiced against it. Specifically regarding the Respondent's allegation that the judge improperly foreclosed it from introducing evidence about the nature of the parties' contract negctiations to show that economic considerations, rather than unfair labor practices, were responsible for prolonging the strike, we note that the record shows clearly that the Respondent made an informed choice not to introduce such evidence in order to avoid expanding the scope of the proceeding to include a "surface bargaining" issue. Also, with respect to the Respondent's contention that the judge improperly relied on hearsay evidence in finding that the Respondent violated the Act by failing to reinstate employee Marvin Cummings, we find it unnecessary to address the Respondent's contention because, even without the alleged hearsay testimony, the record contains no evidence that the Respondent ever satisfied its reinstatement obligation with respect to Cummings.

We correct the following inadvertent errors of the judge.

(continued...)

[7](...continued)
First, the judge stated in her decision that employee Francisco Zamora testified that he could not recall a list of employees being mentioned during the negotiation session that took place about October 31, 1979. The record, however, indicates that Zamora did in fact testify that such a list was mentioned during the meeting. Second, in describing the chronology of events surrounding the return to work of employee Jose Padilla, it is clear from the record that the judge incorrectly identified the testimony of Foreman Daniel Krivoshia as being that of Manager Dick Rowe, who did not testify during the hearing. Third, in describing certain occurrences of alleged strike misconduct involving employee Carlos Alamaroz, the judge incorrectly stated that purchasing agent Loren Peaslee, rather than Almaroz, was shopping with his wife and children when the alleged threat was made by Alamaroz. Fourth, the judge stated that a criminal charge against employee Jose Villavicencio was "dropped" on a motion by the district attorney. The record shows that the original charge was amended to another charge and that Villavicencio pleaded nolo contendere to the amended charge and was fined $70.50. The record,
(continued...)

modified below.[9]

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[7](...continued)
however, does not reveal the nature of the amended charge.

[8] The judge made several collateral unfair labor practice conclusions that were not alleged in the complaint and that were not litigated in the hearing. Accordingly, we do not adopt the judge's conclusions that the Respondent independently violated Sec. 8(a)(3) and (1) of the Act by unilaterally changing job classifications and affording new hires superior employment opportunities, by the more rigorous application of disciplinary measures against individuals engaged in protected concerted activity, and by considering misconduct previously condoned in determining reinstatement decisions. No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally granting paid holidays without providing the Union with prior notice and opportunity to bargain and by raising the issue of additional paid holidays prior to discussion of economic issues. Further, although the judge made a finding that the General Counsel abandoned an 8(a)(5) and (1) allegation that the Respondent bargained directly with employees by offering increased benefits, she erroneously entered an 8(a)(5) finding in her conclusions of law. (No exceptions were filed to the judge's abandonment findings.) Finally, we disavow the judge's ambiguous dictum to the effect that "once a matter is raised in negotiations the employer may institute the change."

1. The Respondent contends that it was denied due process by the judge's consideration of testimony concerning a November 5, 1979 union meeting because the Union failed to comply with a January 28, 1981 subpoena duces tecum requesting all writings related to the Union's October and November 1979 meetings. The Respondent further contends that it was prejudiced by the General Counsel's failure to seek enforcement of the subpoena. In this connection, the Respondent asserts that on the Union's failure to comply with the subpoena the General Counsel, under Section 102.31(d) of the Board's Rules and Regulations, was required to seek enforcement

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[9](...continued)

[9] We have modified the judge's recommended Order and notice to provide the affirmative requirement that the Respondent remove from its records any references to the unlawful discharges and other discriminatory conduct. Sterling Sugars, 261 NLRB 472 (1982).

of the subpoena. The Respondent's arguments are misplaced.

As the judge found, the credited testimony establishes no grounds for finding a willful refusal to comply with the subpoena, or a bad-faith effort on the part of the Union in searching for the missing documents. On the contrary, the evidence shows that the subpoenaed documents, through no fault of the Union, were unavailable. Because it has been demonstrated that the subpoena was incapable of being enforced, the Respondent has shown no prejudice arising from the General Counsel's failure to seek its enforcement. Further, because the Union presented (1) credible testimony concerning its good-faith, albeit unsuccessful, search for the notes taken in the union meeting at issue, and (2) evidence concerning circumstances under which it can reasonably be inferred that the notes could have been

inadvertently destroyed or misplaced (i.e., the retirement or replacement of the two individuals responsible for taking or storing the notes), the judge did not err in declining to draw an adverse inference from the Union's failure to produce the notes, i.e., an inference that the notes would have contradicted the testimony of union witnesses concerning what transpired at the November 5 meeting. Accordingly, we find no merit to the Respondent's contentions as to the documents covered by the subpoena duces tecum.

2. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by the October 1979 termination of striking employees Steven Baugh, Jose Naranjo, Heriberto Valenzuela, Joe Solis, Ruben Gutierrez, and Eduarado Ortiz. As found by the judge, concerning each of these individuals the Respondent informed either

the discharges himself or his union representative that his employment was effectively terminated. Regarding Baugh and Naranjo, the credited evidence reveals that on October 17, 1979, General Manager Tom Simovich informed these individuals at a picket line that they were "fired," that they "don't work here anymore" and directed them to "go home" and threatened their arrest. We agree with the judge that Simovich's comments would reasonably lead an employee to believe that he had been discharged. Trident Recycling Co., 282 NLRB No. 170 (Feb. 17, 1987). We note that Simovich's remarks were entirely unequivocal in character, were phrased as an immediate discharge, were accompanied by a direction to leave the employment site with a concurrent threat of arrest, and were uttered by a high management official so as to lend credence to the finality of the action taken.

Concerning Valenzuela, Solis, Gutierrez, and Ortiz, the credited evidence establishes that in late October 1979 the Respondent's negotiator and labor consultant, Edmund J. Hoy, presented a list of these employees to the Union's business representative, Ralph Gazzigli. The list also included the name of employee Steven Baugh. Hoy informed Gazzigli that these five individuals "would never be rehired, or reinstated under any conditions [or] circumstances" by the Respondent because they were suspected to be involved in strike violence. Several days later, Hoy attempted to present the list to Gazzigli at a negotiation session in the presence of several employee-members of the Union's negotiating committee, including Steven Baugh. On this occasion, Hoy indicated at the outset that contract issues were now secondary to the property damage and vandalism that the Respondent was

experiencing during the strike and that it did not want to continue negotiations in an atmosphere of violence. Hoy then announced that he had a list of individuals that the Respondent "would not take back under any conditions." Hoy indicated unequivocally that "regardless if we come to a contract, to an agreement, or whatever, the strike ends, we will not take these individuals back." At the urging of Gazzigli and the intervention of a Federal mediator, the list was not formally presented on this occasion, although the mediator informed Gazzigli that the Respondent was "adamant" about the matter. Employee Baugh testified that he saw the names on the list at this meeting.

In agreement with the judge, we find that the Respondent effectively terminated the employment of the individuals on this list. Hoy's characterization of the employment tenure of the employees on the

list was clear and unambiguous: they would "never" resume their employment "under any conditions." We reject the notion that Hoy's remarks were simply a bargaining posture that would not necessarily lead employees on the list, or their union representative, to believe that the employees actually had been terminated. We note that Hoy expressly stated that regardless of the cessation of the strike or any contract agreement that might be reached, these individuals would not resume their employment, thereby removing the employment status of these individuals as a negotiable matter and effectively implementing their discharges.[10]

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[10] We find merit in the General Counsel's limited exception with respect to the commencement date of employee Heriberto Valenzuela's backpay. As pointed out by the General Counsel, the judge found that the Respondent, on October 25, 1979, violated Sec. 8(a)(3) and (1) of the Act by discharging Valenzuela and four other employees. However, unlike the backpay date set for the

(continued...)

[10](...continued)
other employees discriminated against on October 25, 1979, the judge found that Valenzuela's backpay was to commence on April 17, 1980. In light of this unexplained inconsistency and the record as a whole, we are convinced that the judge inadvertently excluded Valenzuela from the group of employees whose backpay was to commence on October 25, 1979. We have, accordingly, modified the Order so that Valenzuela's backpay commences as of October 25, 1979.

In adopting the judge's finding that the strike was converted to an unfair labor practice strike on November 5, 1979, when unit employees met to discuss the strike, we note that the October 1979 termination of employees Baugh and Naranjo by Tom Simovich was presented to the membership for consideration as well as the list of employees tendered to Hoy to Gazzigli.

Respondent argues that its written request that all employees return to work by November 2, 1979, somehow negates the effect of its discharge of Baugh and Naranjo. We find that the form letter sent to employees is insufficient to cure the discharges specifically communicated to employees Baugh and Naranjo. The fact that the Respondent sent a form letter does not alter the finding that the message communicated to Baugh and Naranjo by Tom Simovich was that they were no longer employed. Accordingly, we find that the termination of each of these six employees served to convert the strike to an unfair labor practice strike.

(continued...)

3. The complaint alleged that about June 10, 1980, the Respondent discharged a group of 10 employees in violation of Section 8(a)(3) and (1) and that, since that date, the Respondent has failed and refused to

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[10](...continued)
Member Cracraft would not find that the Respondent's actions during strike settlement discussions and contract negotiations of twice tendering a list of employees whom the Respondent desired to have disqualified from reinstatement violated Sec. 8(a)(3) and (1). However, she agrees with her colleagues' finding that the economic strike was converted to an unfair labor practice strike on November 5, 1979, when employees voted to continue the strike based in part on the unlawful discharge of employees Baugh and Naranjo.

In determining the backpay commencement date for certain unfair labor practice strikers included in the Union's unconditional offer to return to work, dated April 17, 1980, the judge incorrectly determined the date to be April 17, 1980, rather than April 21, 1980, the effective date of the unconditional offer as stated in the offer itself. Therefore, we have modified the backpay commencement dates for the employees whose dates were listed as April 17, 1980, in the recommended Order to be April 21, 1980.

reinstate these employees.[11] At the hearing, the General Counsel expressly conceded that these employees were economic strikers who had been replaced by the Respondent before the strike was converted to an unfair labor practice strike on November 5, 1979. Thus, according to the General Counsel's representation at the hearing, these employees were replaced by economic strikers until their termination on June 10, 1980, when the Respondent remitted accrued vacation and profit-sharing benefits to eligible employees in this category. At that point, according to the General Counsel, these employees occupied the status of discharged economic strikers, i.e., as of June 10, 1980.

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[11] This group is comprised of Antonio Andrade, Javier Arroyo, Alejandro Arroyo, David Coronado, Rick Craft, Enrique Figueroa, Lorenzo Franco, Micky Lambright, Francisco Zamora, and Martiniano Rodriguez.

Notwithstanding the failure to the General Counsel to contest the status of this group of employees as replaced economic strikers prior to their discharges, the judge found that these employees had not been permanently replaced prior to the conversion of the strike to an unfair labor practice strike and were entitled to reinstatement and backpay as of April 17, 1980, the date of the unconditional offer to return to work. In view of the scope of the complaint and the representations of the General Counsel, we find that the judge erred in placing the burden on the Respondent, concerning this category of employees, to establish a basis for treating these employees as replaced economic strikers. Rather, we find in agreement with the judge's alternative analysis of this issue that, regarding this group, the unfair labor practice occurred, as

alleged in the complaint, on June 10, 1980,[12] when this group of employees was effectively terminated for discriminatory reasons without any economic justification. In the absence of a complaint allegation that the Respondent unlawfully failed to reinstate these employees in April 1980 on the cessation of the strike, and in light of the theory of the complaint as explained by the General Counsel at the hearing, we find that the Respondent was not put on notice that any reinstatement issues based on events prior to the June 10, 1980 terminations were to be litigated a to this group. Accordingly, we will leave to the compliance stage consideration of the reinstatement and backpay rights of these employees in light of their unlawful termination in June 1980.

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[12] Francisco Zamora, a member of this group, was discharged on March 7, 1980.

4. The complaint also alleged that about May 30, 1980, the Respondent limited the reinstatement rights of a group of four laid-off employees to the duration of their employment tenure with the Respondent, in violation of Section 8(a)(3) and (1).[13] At the hearing, the General Counsel expressly indicated that the layoff status of these employees was not unlawful and not at issue, and that the complaint allegation was directed to the Respondent's limitation of reinstatement rights, following their layoff. In remedying this violation, however, the judge found that the Respondent was required to offer immediate reinstatement and backpay to these employees as of April 1980, when an unconditional offer to return to work was tendered and that backpay continued to accrue

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[13] The employees in this group are Gonzalo Andrade, Manuel Goray, Javier Lopez, and Jose Reyes.

notwithstanding the layoff status of these employees. Thus, the judge found that the Respondent had failed entirely to establish an economic defense to support its actions toward this group. By ordering immediate reinstatement and backpay, the judge essentially found that the layoff of these employees was impermissible. This finding is in direct contrast to both the representations of the General Counsel at the hearing and to the limited scope of the complaint, which is directed solely to the placement of impermissible conditions on the employees' reinstatement rights. In these circumstances, we find that the Respondent was not put on notice that the lawfulness of the layoff status of these employees was to be litigated. Although we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by placing impermissible restrictions on the reinstatement rights or

these employees, we find that the appropriate remedy is to order the Respondent to cease and desist from the placement of such restrictions. We will leave to the compliance stage of these proceedings resolution of any issues concerning whether the unfair labor practice--the limitation of reinstatement rights--had a bearing on the actual reinstatement of these employees and, if so, whether there was any resulting loss of pay after May 30, 1980.[14]

5. The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate 11 striking employees who allegedly engaged in strike misconduct. The Respondent expressly challenges the judge's findings on the misconduct issues with

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[14] We note that these four laid-off employees are additionally entitled to be made whole for the period April 21 to May 30, 1980, when they were unreinstated unfair labor practice strikers who had unconditionally offered to return to work.

respect to strikers Jose Villavicencio, Carlos Almaroz, Joe Solis, and Ramon Rodriguez. It is less clear whether it is raising such a challenge about the other seven, because it presents no arguments in its brief with respect to the lawfulness of its decision to deny them reinstatement on misconduct grounds.[15] In any event, for the

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[15] These other seven employees are Alberto Cortez, Ernesto Arroyo, Cesar Moran, Javier Olague, Jose Padilla, Martiniano Rodriguez, and Heriberto Valenzuela.

We find merit in the Respondent's contention that backpay otherwise owing to employee Alberto Cortez was tolled by the Respondent's valid attempt to communicate to Cortez an offer to return to work by telegram of November 12, 1980, sent to Cortez' last known address. Bodolay Packaging Machinery, 271 NLRB 10, 11 (1984). The tolling of backpay, however, does not relieve the Respondent of its reinstatement obligation toward Cortez. Burnup & Sims, 256 NLRB 965, 966 (1981).

We find no merit in the Respondent's contention that any backpay owing to Cesar Moran ended when, by letter of September 26, 1980, Moran purportedly was offered reinstatement. The record shows that on

(continued...)

following reasons we agree with the judge that the Respondent unlawfully failed to reinstate those 11 employees.

In order to establish a lawful basis for denying reinstatement to an employee for engaging in strike misconduct, an employer must initially show that it entertained a good-faith belief that the striker actually engaged in misconduct serious enough to warrant denying reinstatement. If such a showing is made, the burden then shifts to the General Counsel to demonstrate that the alleged misconduct did not in fact occur. If the employer fails to make the initial showing or if the General Counsel carries her burden of showing that the alleged misconduct

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[15](...continued)
that date the Respondent notified Moran, an unfair labor practice striker, that he had been laid off and would be reinstated only when a job opening occurred. Because the letter did not constitute a proper offer of present reinstatement, we find it insufficient to toll backpay.

did not in fact occur, the General Counsel prevails. If the employer makes the initial showing and the General Counsel does not carry her burden of showing no actual misconduct, then the employer prevails, and the denial of reinstatement will be found lawful. General Telephone Co., 251 NLRB 737, 739 (1980), enfd. mem. 673 F.2d 551 (D.C. Cir. 1982). See generally NLRB v. Burnup & Sims, 379 U.S. 21, 23 (1964).

Even in cases in which a striker has actually engaged in misconduct and the employer denies reinstatement on the grounds of that misconduct, an employer may still violate Section 8(a)(3) and (1) of the Act if that denial represents disparate treatment of strikers as compared with nonstrikers or replacements, i.e., if it is denying reinstatement to strikers for conduct that is substantially the same as conduct that it has tolerated on the part of employees who have

refrained from striking. Garrett Railroad Car v. NLRB, 683 F.2d 731, 740 (3d Cir. 1982) (applying the principle but upholding the refusal to reinstate because employer lacked knowledge of nonstriker involvement in misconduct); Aztec Bus, 289 NLRB No. 125 (July 22, 1988).

Like the judge, we apply the foregoing tests only to those grounds for denying reinstatement that the Respondent actually purported to rely on when it denied reinstatement to strikers after their unconditional offers to return. Following the tender of those offers, the Respondent, through Manager Ed Simovich, met individually on May 30, 1980, with each employee accused of strike misconduct. At this time, the Respondent informed those employees that they were ineligible for reinstatement until certain pending criminal charges were resolved. Based on repeated statements and

correspondence to employees to this effect, and on the failure ever to inform these employees that other matters were a basis for denial of reinstatement,[16] the judge found, and we agree, that the only asserted basis for the denial of reinstatement was conduct that was the subject of those pending charges.[17]

First, concerning employees Villavicencio, Almaroz, Solis, and Ramon Rodriguez, the judge credited their testimony

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[16] The judge expressly discredited Ed Simovich's assertions that the Respondent took into consideration other matters allegedly occurring during the strike that were not the subject of criminal charges and that he intended to investigate such complaints further.

[17] Further, we agree with the judge that the Respondent did not rely on any asserted misconduct occurring prior to October 30, 1979, because on that date it offered to all striking employees, including the employees alleged to have engaged in misconduct, the opportunity to return to work.

that they did not engage in the acts of misconduct that were the subject of criminal charges pending when the Respondent denied them reinstatement. We find no basis to disturb those findings.[18]

With respect to those four and the other seven--whose arrests were related to an

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[18] The judge credited Villavicencio's denial of accusations that he threw rocks or stones or engaged in other misconduct. The judge also credited Almaroz' denial that he threw rocks at vehicles or engaged in other misconduct. Regarding Ramon Rodriguez, the judge credited Rodriguez' denial that he kicked the side of a car or purposely beat on cars or threatened another individual. Concerning Joe Solis, the judge found that Solis did not make racial slurs or threaten another employee and noted that a criminal charge involving an alleged threat to blow up a vehicle, which Solis denied, was dismissed. The judge also found that the Respondent did not rely on Solis' alleged threat to kill Tom Simovich in denying reinstatement as this was not the subject of a criminal charge and it preceded the October 30, 1979 reinstatement offer to employees. Moreover, with regard to this alleged threat to Simovich, as noted infra, the Respondent expressed no concern when striking employees were threatened similarly by nonstriking employees.

alleged blocking of a thoroughfare--we uphold the judge's ultimate findings on the additional ground that these denials of reinstatement constituted disparate treatment when compared with the Respondent's actions towards nonstrikers and replacements. Thus, for example, the Respondent was aware that nonstriking employee Freddie Vallejos had physically assaulted striker Ramon Rodriguez. It was also aware that Vallejos had been arrested in connection with another strike-related incident in which he was accused of swinging an ax. (Vallejos pleaded guilty to a lesser offense in connection with the latter incident.) The Respondent took no disciplinary action at all against Vallejos.

Further, after the conclusion of the strike, the Respondent failed to make any significant investigation into repeated incidents of threats and violence against former strikers Padilla, Valenzuela, Elpidio

Cortez, Elizarraras, Vargas, and Salvador Garcia that were brought to its attention. Padilla filed a police report following an incident when he was punched in the stomach by nonstriker N. Lopez, who then threatened to kill Padilla. Padilla was also assaulted by nonstriker Nieblas during this incident. When the incident was brought to the attention of management, Manager Ed Simovich merely shrugged and informed Padilla he could not do anything. Similarly, Ed Simovich took no action when informed by former striker Valenzuela that nonstriker Corona had threatened to kill him and did nothing following another incident when Valenzuela was surrounded and physically menaced by employees.

Notwithstanding its knowledge of these acts of misconduct directed against strikers by nonstrikers, the Respondent took no action against the perpetrators. In contrast, the

Respondent failed to reinstate strikers accused of comparable or lesser misconduct in a timely manner. This discriminatory and disparate treatment establishes that the Respondent lacked good faith and acted discriminatorily in denying reinstatement to the 11 employees at issue because of alleged strike misconduct. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by failing to offer timely reinstatement to the 11 employees in this category.[19]

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[19] The judge's decision issued prior to the Board's decision in Clear Pine Moldings, 268 NLRB 1044 (1984). In that case the Board adopted the objective standard for assessing alleged strike misconduct of whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Further, in Gem Urethane Corp., 284 NLRB No. 122 (July 20, 1987), the Board reiterated the principle that if an employer establishes a honest belief that an employee seeking reinstatement has engaged in misconduct, the General Counsel must come forward with

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Conclusions of law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of

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[19](...continued)
evidence that either the employee did not engage in the alleged misconduct or that the conduct was not sufficiently serious to preclude reinstatement. Thus, "at all times, the burden of proving discrimination is that of the General Counsel.'' Id., slip op. at 11--12. Here, the Respondent's denial of reinstatement based on alleged strike misconduct was not undertaken in good faith and on a nondiscriminatory basis. Further, as noted, the evidence, pursuant to the judge's credibility resolutions, shows that some of the employees at issue did not engage in the disqualifying misconduct that purportedly formed the basis for the Respondent's denial of reinstatement. In this regard, we find it unnecessary to consider, and do not adopt, the judge's ''arguendo'' discussion about employee Ramon Rodriguez and do not rely on all the cases cited by the judge, including Coronet Casuals, 207 NLRB 304 (1973), and the Board's decision in W. C. McQuaide, Inc., 220 NLRB 593 (1975), enfd. denied 552 F.2d 519 (1977).

America--UAW (International Union or Union); and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America--UAW, Local 509 (Local Union), are labor organizations within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

> All production and maintenance employees, including shipping and receiving employees, lead persons, service employees, inspectors and truck drivers employed by Respondent at its facilities located at 2439 North Rosemead Boulevard, 2500 North Rosemead Boulevard and 2423 Troy Street, South El Monte, California; excluding all office clerical employees, professional

employees, guards, and supervisors as defined in the Act.

4. At all times since December 14, 1978, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

5. The work stoppage, which began on October 15, was prolonged by the Respondent's unfair labor practices as of November 5, 1980.

6. By threatening to have striking employees fired and/or arrested while they were peacefully picketing, the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and engaged in unfair labor Practices in violation of Section 8(a)(1) of the Act.

7. By offering, on November 2, 1979, Manuel Avalos and Ernesto Franco increased benefits if they abandoned the strike and

returned to work in order to induce employees to withdraw their support for the Union and the strike, the Respondent has interfered with its employees' Section 7 rights and has violated Section 8(a)(1) of the Act.

8. By threatening employees on the picket line with vehicular assault, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

9. By discharging Steven Baugh and Jose Naranjo on October 17, 1979; Baugh, Joe Solis, Eduardo Ortiz, Heriberto Valenzuela, and Ruben Gutierrez on October 25, 1979; and Francisco Zamora on March 7, 1980, because of their membership in or activities on behalf of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

10. By unilaterally granting to its employees the benefit of additional paid holidays without notifying or consulting with

the Union in good faith, the Respondent violated Section 8(a)(5) and (1) of the Act.

11. By withdrawing recognition from the Union and thereafter failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the aforesaid unit until a decertification petition has been processed, the Respondent has violated Section 8(a)(5) and (1) of the Act.

12. By refusing to bargain collectively with the Union, by refusing to furnish or unduly delaying the furnishing of certain information, which is relevant to the Union's performance of its representation responsibilities on behalf of unit employees, the Respondent has violated Section 8(a)(5) and (1) of the Act.

13. By failing and refusing since April 21, 1980, to make timely offers of reinstatement to the following unfair labor

practice strikers: Steven J. Baugh, Jose G. Naranjo, John Gresko, Henry Carrilo, Filiberto Ruiz, Tomas Vargas, Manuel Cruz, Nicholas Diaz, Ernesto Franco, Pedro Pena, Salvador Hernandez, Erasmo Salazar, Rene Gallardo, Salvado Garcia, Octaviano Arellano, Javier Olague, Ernesto Cortez, Pedro Garcia, Jesus Valdez, Salvador Elizarraras, Ernesto Lopez, Wallace Kerr, Alejandro Lopez, Jose Pedroza, Raymond Wise, Gonzalo Andrade, Manuel Garay, Javier Lopez and Jose Reyes because they engaged in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

14. By failing and refusing since May 9, 1980, to make timely offers of reinstatement to Vincent Inez Gonzales Banaga, Raul Cortez, Marvin Cummings, Oscar Guerrero, Calvin Hassler, David Hassler, Ronald Kerr, and Manuel Avalos, because they engaged in protected concerted activity, the

Respondent violated Section 8(a)(3) and (1) of the Act.

15. By limiting the duration of the reinstatement rights of Gonzalo Andrade, Manuel Garay, Javier Lopez, and Jose Reyes to the length of their tenure with Respondent because they engaged in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

16. By discharging about June 10, 1980, Antonio Andrade, Alejandro Arroyo, Javier Arroyo, David Coronado, Ricky Craft, Enrique Figueroa, Lorenzo Franco, Mickey Lambright, Martiniano Rodriguez, and Francisco Zamora, and failing and refusing to reinstate these employees because they engaged in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

17. By unlawfully requiring Jesus Valdez about August 6, 1980, to execute an

application and take a physical examination as a new employee as a condition to reinstatement and accept employment as a new employee, the Respondent violated Section 8(a)(3) and (1) of the Act.

18. By failing to give Elpidio Cortez and Armando Escandon a reasonable amount of time to respond to the offer of recall, the Respondent violated Section 8(a)(3) and (1) of the Act.

19. By unlawfully failing and refusing to offer timely reinstatement to Carlos Almaroz, Ernesto Arroyo, Alberto Cortez, Cesar Moran, Javier Olague, Jose Padilla, Ramon Rodriguez, Martiniano Rodriguez, Joe Solis, Heriberto Valenzuela, Jose Villavicencio, and other strikers named herein, and by discharging on October 31, 1980, Jose Villavicencio, Carlos Almaroz, and Ramon Rodriguez, the Respondent has violated Section 8(a)(3) and (1) of the Act.

20. By placing impermissible preconditions for reinstatement on the striking employees including the acceptance of new employee status, the Respondent violated Section 8(a)(3) and (1) of the Act.

21. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

In view of long duration of the strike, commencing on October 15, 1979, and ending April 7, 1980, the extremely long period since the end of the strike, and the numerous unfair labor practices of Champ Corporation that prolonged the strike, certain special

remedies are necessary to restore, insofar as practicable, the status quo ante. In all probability, many of the strikers have since taken employment with other employers and many out of necessity moved to other locations. They should be accorded full and equitable opportunity to consider present offers of reinstatement, free of any fears of the recurrence of the unfair labor practices against them.

The Respondent, therefore, shall, in addition to the usual posting, prepare a Spanish translation of the official English-language notice, since the record reveals that a substantial number of the Respondent's employees speak Spanish; both English and Spanish versions shall be simultaneously posted on all plant bulletin boards[20] and copies of both versions mailed

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[20] Hasa Chemical, 235 NLRB 903 (1978).

to each employee currently employed and to each employee named in Schedules 1 through V appended hereto. All diligent efforts shall be employed by the Respondent to assure that such communication reaches the addressees, including the acceptance of assistance by the Union, if offered. The Respondent shall provide the Regional Director for Region 21 with proof of such mailing.

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, it is ordered that the Respondent be required to provide the International Union, in writing, with: (1) A description of the job duties performed by all unit employees for the preceding 12 months and (2) the dates of layoff of all unit employees who had been laid off during the preceding 12 months. In addition, the Respondent shall meet and participate in negotiation sessions and cease

refusing to do so based on the decertification petition found herein not to raise a valid question of the representative status of the International Union. It is also ordered that the Respondent ceases unilaterally changing the existing terms and conditions of employment by paying nonstriking employees for days its facilities are shut down, without prior notification and bargaining with the International Union.

We shall also order reinstatement of the unfair labor practice strikers, with the exceptions noted hereinabove, and in the order and appended schedules, on their unconditional offer to return to work and the dismissal of persons hired on or after November 5, 1979, if that becomes necessary. NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 520--529 (3d Cir. 1977); Newport News Shipbuilding Co., 236 NLRB 1637 (1968), enfd. 602 F.2d 73 (4th Cir. 1979). Reinstatement

shall mean reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges previously enjoyed. Backpay shall be computed for those employees found eligible for reinstatement by calculating for each of them a sum equal to their individual wages as of the date of their unconditional offer to return to work up to the date of the Respondent's offer of reinstatement, less any net earnings during such period, with interest thereon to be computed in the manner prescribed in New Horizons for the Retarded.[21]

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[21] 283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with Florida Steel Corp., 231 NLRB 651 (1977).

It is also ordered that those employees found to have been discriminatorily discharged while engaged in a lawful strike will be entitled to backpay from the date of discharge until the date offered reinstatement. Abilities & Goodwill, Inc., 241 NLRB 27 (1979).

The Respondent will also be required to comply with the Order and to post appropriate notices.

ORDER

The National Labor Relations Board orders that the Respondent, Champ Corporation, South El Monte, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with replacement, termination, discharge, or other reprisal for engaging in a protected strike or other concerted activities, or coercing or

soliciting employees to abandon such activities.

(b) Threatening to have striking employees arrested.

(c) Threatening employees on the picket line with vehicular assault.

(d) Promising employees increased benefits if they abandon the strike and the Union and return to work.

(e) Discharging striking employees, refusing to reinstate, or offering to grant reemployment only as new employees because they have engaged in a protected strike or other concerted activities for their mutual aid or protection.

(f) Unilaterally implementing contract proposals affecting changes in wages and other terms and conditions of employment of employees represented by the Union.

(g) Withholding recognition from the International Union and thereafter failing

and refusing to recognize the International Union as the exclusive collective-bargaining representative of the employees in the described unit.

(h) Failing to give or unnecessarily delaying in giving the Union, on request, information relevant for the Union's representational duties as the exclusive bargaining representative of the employees in the described unit.

(i) Unduly delaying or discriminatorily failing and refusing to reinstate striking employees because they engaged in protected concerted activity.

(j) Limiting the duration of the reinstatement rights of employees because they engaged in protected concerted activities.

(k) In any other manner discouraging membership in the Union or any other labor organization by discrimination with regard to

hire or tenure of employment or any term or condition of employment.

(l) Refusing to bargain collectively with the International Union by unilaterally granting employees additional paid days off without notifying or consulting with the Union in good faith.

(m) Withdrawing recognition from the International Union and thereafter failing and refusing to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit until a decertification petition had been processed.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer each of the unfair labor practice strikers that Respondent classified as permanently replaced, who later were terminated as listed in the attached Schedule I, immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees for any loss of earnings, in the manner set forth in remedy section of this decision.

(b) Offer Ronald Kerr and Marvin Cummings immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole all employees who did not personally appear on April 21, 1980, for any loss of earnings, as detailed in the attached Schedule II, except where noted therein as having no such entitlement, in the manner set forth in the remedy section of this decision.

(c) Offer each of the unfair labor practice strikers classified by Respondent as being on layoff, as listed in the attached Schedule III, immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees for any loss of earnings, in the manner set forth in the remedy section of this decision, in the event that it is determined at compliance that they were not reinstated because of the Respondent's impermissible limitation of their recall rights.

(d) Make whole each of the unfair labor practice strikers, as listed individually in the attached Schedule IV, for any loss of earnings occasioned by Respondent's failure to reinstate these employees in a timely fashion, in the manner set forth in the remedy section of this decision.

(e) Offer Jose Villavicencio, Carlos Almaroz, Alberto Cortez, Cesar Moran, and Ramon Rodriguez immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees as appear on the attached Schedule IV for any loss of earnings, in the manner set forth in the remedy section of this decision.

(f) Offer employees found eligible for reinstatement recall in a manner that affords them a reasonable amount of time to respond.

(g) Furnish the Union a description of the job duties performed by all unit employees for the preceding 12-month period and the date of the lay off of all unit employees that have been laid off during the preceding 12-month period.

(h) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done

and that the discharges will not be used against them in any way.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its plant in South El Monte, California, copies of the attached notice marked "Appendix,"[22] and simultaneously post a notice containing a Spanish-language version of the original notice. Copies of the notice, on forms

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[22] If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Mail a copy of the above-described notices to each currently working employee and to each unfair labor practice striker listed in Schedules I through V in the manner set forth in the remedy section of this decision.

(l) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated, Washington, D.C. November 25, 1988

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins, Jr. Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with replacement, termination, discharge, or other reprisal for engaging in a protected strike or other concerted activities, or coerce or solicit you to abandon such activities.

WE WILL NOT threaten to have striking employees arrested.

WE WILL NOT threaten you on the picket line with vehicular assault.

WE WILL NOT promise you increased benefits if you abandon the strike and the Union and return to work.

WE WILL NOT discharge you, refuse to reinstate, or offer to grant you reemployment only as a new employee because you have engaged in a protected strike or other concerted activities for your mutual aid or protection.

WE WILL NOT unilaterally implement contract proposals affecting changes in wages and other terms and conditions of employment of employees represented by the Union.

WE WILL NOT withhold recognition from the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America--UAW; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America--UAW, Local 509, and thereafter fail and refuse to recognize the International Union as the exclusive collective-bargaining representative of the employees in the described unit.

WE WILL NOT fail to give or unnecessarily delay in giving the Union, on request, information relevant for the Union's representational duties as the exclusive bargaining representative of the employees in the described unit.

WE WILL NOT unduly delay or discriminatorily fail and refuse to reinstate you because you engaged in protected concerted activity.

WE WILL NOT limit the duration of your reinstatement rights because you engaged in protected concerted activities.

WE WILL NOT in any other manner discourage membership in the Union or any other labor organization by discrimination with regard to

hire or tenure of employment or any term or condition of employment.

WE WILL NOT refuse to bargain collectively with the International Union by unilaterally granting employees additional paid days off without notifying or consulting with the Union in good faith.

WE WILL NOT withdraw recognition from the International Union and thereafter fail and refuse to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit until a decertification petition has been processed.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer each of you that we classified as permanently replaced, who later were terminated as listed in the attached Schedule I, immediate reinstatement to your former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make you whole for any loss of earnings, plus interest.

WE WILL offer Ronald Kerr and Marvin Cummings immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole all employees who did not personally appear on April 21, 1980, for any loss of earnings, as detailed in the attached Schedule II, except where noted therein as having no such entitlement, plus interest.

WE WILL offer each of you classified by us as being on layoff, as listed in the attached Schedule III, immediate reinstatement to your former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make you whole for any loss of earnings, plus interest, in the event that it is determined at compliance that you were not reinstated because of our impermissible limitation of your recall rights.

WE WILL make whole each of you, as listed individually in the attached Schedule IV, for any loss of earnings occasioned by our failure to reinstate you in a timely fashion, plus interest.

WE WILL offer Jose Villavicencio, Carlos Almaroz, Alberto Cortez, Cesar Moran, and Ramon Rodriguez immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make them whole, as appear on the attached Schedule IV, for any loss of earnings, plus interest.

WE WILL notify each of them, that we have removed from our files any reference to their discharge and that the discharge will not be used against them in any way.

WE WILL, on request, recognize and bargain with the International Union as the exclusive collective-bargaining representative of our employees in the following described appropriate unit with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement. The appropriate unit includes:

All production and maintenance employees, including shipping and receiving employees, lead persons, service employees, inspectors and truckdrivers employed by Respondent at its facilities located at 2439 North Rosemead Boulevard 2500 North Rosemead Boulevard, and 2423 Troy Street, South El Monte, California; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer those of you found eligible for reinstatement recall in a manner that affords you a reasonable amount of time to respond.

WE WILL furnish the Union a description of the job duties performed by all unit employees for the preceding 12-month period and the date of layoff of all unit employees that had been laid off during the preceding 12-month period.

SCHEDULE I

Employees Permanently Replaced Who Were Terminated

	Backpay Periods, if any
Antonio Andrade	June 10, 1980 to present, as further determined at compliance
Alejandro Arroyo	June 10, 1980 to present, as further determined at compliance
Javier Arroyo	June 10, 1980 to present, as further determined at compliance

David Coronado	June 10, 1980 to present, as further determined at compliance
Ricky Craft	June 10, 1980 to present, as further determined at compliance
Enrique Figueroa	June 10, 1980 to present, as further determined at compliance
Lorenzo Franco	June 10, 1980 to present, as further determined at compliance
Mickey Lambright	June 10, 1980 to present, as further determined at compliance
Martiniano Rodriguez	June 10, 1980 to present, as further determined at compliance
Francisco Zamora	March 7, 1980 to present, as further determined at compliance

SCHEDULE II

Employees Who Did Not Personally Appear on April 21

	Backpay Periods, if any
Vincent Inez Banaga	May 9 to July 18, 1980
Raul Cortez	May 9 to July 10, 1980
Oscar Guerrero	May 9 to July 10, 1980
Calvin Hassler	May 9 to July 10, 1980
David Hassler	May 9 to July 10, 1980

Dexter Kerr	No entitlement to reinstatement or backpay
Ronald Kerr	May 9 to present, entitled to reinstatement
Randolph Montoya	No entitlement to reinstatement or backpay
Manuel Avalos	May 9 to July 11, 1980
Marvin Cummings	May 9 to present, entitled to reinstatement

SCHEDULE III

Employees on Layoff

	Backpay Periods, if any
Gonzalo Andrade	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance
Manuel Garay	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance
Javier Lopez	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance

Jose Reyes	April 21-May 30, 1980; any additional entitlement to backpay is to be determined at compliance

SCHEDULE IV

Employees Whose Reinstatement Was Delayed

	Backpay periods, if any
John Gresko	April 21 to May 9, 1980
Henry Carrillo	April 21 to May 9, 1980
Filiberto Ruiz	April 21 to May 9, 1980
Tomas Vargas	April 21 to May 15, 1980
Jose Naranjo	October 17, 1979 to May 5, 1980
Steven Baugh	October 17, 1979 to May 16, 1980
Manuel Cruz	April 21 to May 19, 1980
Nicholas Diaz	April 21 to May 19, 1980
Armando Escando	April 21 to July 31, 1980
Elpidio Cortez	April 21 to June 17, 1980
Ernesto Franco	April 21 to May 21, 1980
Pedro Pena	April 21 to May 22, 1980
Salvador Fernandez	April 21 to May 22, 1980
Erasmo Salazar	April 21 to May 22, 1980
Rene Gallardo	April 21 to May 23, 1980
Salvador Garcia	April 21 to May 23, 1980
Octaviano Arellano	April 21 to May 23, 1980
Ernesto Cortez	April 21 to May 27, 1980
Salvador Elizarraras	April 21 to May 27, 1980
Ernesto Lopez	April 21 to May 27, 1980
Wallace Kerr	April 21 to May 29, 1980
Pedro Garcia	April 21 to May 29, 1980
Alejandro Lopez	April 21 to May 29, 1980
Pedro Lopez	To be determined during backpay proceedings

Jose Pednoza	April 21 to May 30, 1980
Raymond Wise	April 21 to May 30, 1980
Jesus Valdez	April 21 to September 10, 1980

SCHEDULE V

Employees Charged

	Backpay Periods, if any
Ruben Gutierrez	From October 25, 1979 to date of disqualifying behavior, to be determined during the compliance phase of this proceeding
Eduardo Ortiz	From October 25, 1979 to date of disqualifying behavior, to be determined during the compliance phase of this proceeding
Joe Solis	October 25, 1979 to present
Jose Villavicencio	April 21 to present
Carlos Almaroz	April 21 to present
Alberto Cortez	April 21 to November 12, 1980
Ernesto Arroyo	April 21 to January 31, 1981
Cesar Moran	April 21 to present
Javier Olague	April 21 to October 30, 1980
Jose Padilla	April 21 to September 29, 1980
Ramon Rodriguez	April 21 to present
Martiniano Rodriguez	(See Schedule I)

Heriberto
Valenzuela

October 25, 1979 to
October 9, 1980

CHAMP CORPORATION

(Employer)

Dated _____By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 South Flower Street, 11th Floor, Los Angeles, California 90017-2803, Telephone 213-894--5229.

91-314

SUPREME COURT, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHAMP CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, LOCAL 509,

Respondents.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

VOLUME 2

McLaughlin and Irvin
Thomas S. Kerrigan
Counsel of Record

Steven W. Brennan
801 South Grand Avenue, Third Floor
Los Angeles, California 90017-4621
Telephone: (213) 629-1414

South El Monte, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CHAMP CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW; and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW, LOCAL 509

Case Nos. 21-CA-18696
21-CA-19007
21-CA-19423
21-CA-19424

Joel B. Martinez, Esq., of Los Angeles, CA,
for the General Counsel.

Thomas S. Kerrigan, Esq., McLaughlin & Irvin, of Los Angeles, CA,
for the Respondent.

Henry A. Fenton, Esq., Levy & Goldman,
of Los Angeles, CA for the Charging Party

DECISION

JOAN WIEDER, Administrative Law Judge: This case was tried in Los Angeles, California on December 1, 2 and 3, 1980,[1] January 26, 27, 28, 29 and 30, 1981, February 2, 3, 4, 5, 6, 25, 26 and 27, 1981, March 30 and 31, 1981, and April 1 and 2, 1981. A second consolidated amended complaint was issued on September 29, 1980[2] based upon charges[3] filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,

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[1] Unless otherwise indicated all dates herein refer to 1980.

[2] The complaint was further amended at the trial.

[3] The original charges in Case No. 21-CA-18696 were filed on February 15. The first amended charge was filed on March 6. The original charge in Case No. 21-CA-19007 was filed on May 2, which was amended on July 25. The sole charge in Case No. 21-CA-19423 was filed on August 15. The original charge in Case No. 21-CA-19424 was filed on August 15, and the amended charge was filed on September 11.

hereinafter referred to as the International or International Union, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, Local 509, hereinafter referred to as the Local, and with the International collectively referred to as the Union. The complaint alleged that Champ Corporation, herein called the Company or Respondent, violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended.

The complaint alleges that, subsequent to the commencement of an economic strike by certain employees of Respondent on or about October 15, 1979, the Company engaged in the following unfair labor practices:

1. On or about October 24, 25 and 26, November 23, and December 24, 1979, Respondent, without prior notification to or bargaining with the International Union,

changed the existing terms and conditions of employment of the employees in the described unit[4] above, by shutting down its facilities,

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[4] The unit was described in the complaint as follows: All production and maintenance employees, including shipping and receiving employees, lead persons, service employees, inspectors and truck drivers employed by Respondent at its facilities located at 2439 North Rosemead Boulevard, 2500 North Rosemead Boulevard, and 2423 Troy Street, South El Monte, California; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Respondent admitted in its answer to the second amended complaint that this description is accurate. Respondent also admitted, as alleged in the complaint, that:

On December 14, 1978, a majority of the employees of Respondent in the above-described unit, by a secret-ballot election conducted under the supervision of the Regional Director for Region 21 of the National Labor Relations Board, designated and selected the International union as their representative for the purposes of collective bargaining with Respondent, and on December 22, 1978, the Regional Director for Region 21 certified the International Union as the exclusive collective-bargaining representative, by virtue of Section 9(a) of

(continued...)

and paying its nonstriking employees for the days that its facilities were shut down in violation of Section 8(a)(5) and (1) of the Act.

2. On or about November 2, 1979, Respondent, through T. Simovich, at a picket line established in front of Respondent's facility located at 2423 Troy Street, South El Monte, California, bargained directly with employees in the unit described above, in violation of Section 8(a)(5) and (1) of the Act.

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[4](...continued)
the Act, of all the employees of Respondent in said unit. Since December 14, 1978, the International Union has been the representative for the purposes of collective bargaining of a majority of the employees in the above-described unit, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

3. On or about March 4, 1980, Respondent, through Hoy, notified the International Union that it would not meet and participate in further negotiation sessions until such time as the Board completed processing a representation petition filed by Respondent in Case 21-RM-2013, even though said petition did not raise a valid question concerning representation as at the time of filing, and the Respondent had engaged in the unlawful acts and conduct described in paragraphs 1 and 2 above, in violation of Section 8(a)(5) and (1) of the Act.

4. Since on or about June 6, 1980, the International Union, by letter, has requested Respondent to furnish the International Union with the following information:

a. A description of the job duties performed by all unit employees, for the preceding 12-month period.

b. The dates of layoff of all unit employees that had been laid off during the preceding 12 months.

The information requested by the International Union, as described in 25 paragraphs 4(a) and (b) above, is necessary for, and relevant to, the International Union's performance of its function as the exclusive collective-bargaining representative of the employees in the described unit. Since on or about June 9, 1980, Respondent has failed and refused to furnish the International Union the information requested by it as described in paragraph 4(a) above; and from on or about June 9, 1980, to on or about September 8, 1980, Respondent failed and refused to furnish the International Union with the information requested by it as described in paragraph 4(b) above, in violation of Section 8(a)(5) and (1) of the Act.

5. (a) On or about October 17, 1979, Respondent discharged employees Steven J. Baugh and Jose G. Naranjo.

(b) Since on or about October 17, 1979, Respondent has failed and refused, and continues to fail and refuse, to reinstate employees Baugh and Naranjo.

(c) Respondent discharged, and has failed and refused, and continues to fail and refuse, to reinstate employees Baugh and Naranjo to their former positions of employment because they engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, and that by these actions Respondent has violated Section 8(a)(1) and (3) of the Act.

6. (a) On or about October 25, 1979, Respondent discharged employees Ruben Gutierrez, Edward Ortiz, Joe Solis, and Heriberto Valenzuela.

(b) Since on or about October 25, 1979, Respondent has failed and refused, and continues to fail and refuse, to reinstate the employees named in paragraph 6(a) above.

(c) Respondent discharged, and has failed and refused, and continues to fail and refuse, to reinstate the employees named in paragraph 6(a) above to their former positions of employment because they engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(1) and (3) of the Act.

7. The strike was prolonged by the unfair labor practices of Respondent described in paragraphs 5 and 6 above, which, accordingly, converted the strike to an unfair labor practice strike.

(a) On or about March 7, 1980, Respondent discharged employee Frank Zamora.

(b) Since on or about March 7, 1980, Respondent has failed and refused, and continues to fail and refuse, to reinstate employee Zamora.

(c) Respondent discharged, and has failed and refused, and continues to fail and refuse, to reinstate employee Zamora to his former position of employment because he engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(1) and (3) of the Act.

9. On or about April 18, 1980, the employees who had engaged in the strike described above, through the Union, made an unconditional offer to return to their former positions of employment. Respondent, in its reply to the second amended complaint, denies that the Union made such an offer.

10. (a) Since on or about April 24, 1980, Respondent has failed and refused, and continues to fail and refuse, to reinstate the employees listed below, to their former positions of employment:

Carlos Almaroz,	Dexter Kerr,
Manuel Avalos	Donald Kerr
Vicente Banaga	Randolph Montoya
Raul Cortez	Ernesto Arroyo
Marvin Cummings	Alberto Cortez
Oscar Guerrero	Cesar Moran
Calvin Hassler	Javier Olague
David Hassler	Ramon Rodriguez
Jose Padilla	Joe Solis
Martiniano Rodriguez	Jose Villavicencio
Heriberto Valenzuela	Jesus Valdez

(b) Respondent has failed and refused, and continues to fail and refuse, to reinstate the employees listed in paragraph 10(a) above to their former positions of employment because they engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection or because they had participated in the strike, in violation of Section 8(a)(1) and (3) of the Act.

11. (a) From on or about April 24, 1980, until on or about the dates set forth opposite the respective names of the employees listed below, Respondent failed and refused to make offers of reinstatement to said employees:

May 7, 1980	John Gresko
	Henry Carrillo
	Filiberto Ruiz
May 13, 1980	Tomas Vargas
	Jose Naranjo
May 14, 1980	Steve Baugh
May 15, 1980	Manuel Cruz
	Nicholas Diaz
May 19, 1980	Ernesto Franco
May 20, 1980	Pedro Pena
	Salvador Hernandez
	Erasmo Salazar
May 21, 1980	Rene Gallardo
	Salvador Garcia
	Octaviano Arellano
May 23, 1980	Ernesto Cortez
	Salvador Ellizarraras
	Ernesto Lopez
May 27, 1980	Wallace Kerr
	Pedro Garcia
	Alejandro Lopez
May 28, 1980	Pedro Lopez
	Jose Pedroza
	Raymond Wise

(b) Respondent failed and refused to make offers of reinstatement to the

employees listed in paragraph 11(a) above until on or about the dates set forth opposite their names, because they engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and because they had participated in the strike, in violation of Section 8(a)(1) and (3) of the Act.

12. (a) On or about May 30, 1980, Respondent limited the reinstatement rights of the employees listed below, by limiting the duration of their reinstatement rights to the same length of time as their tenure with Respondent:

Andrade Gonzalo
Manuel Garay
Javier Lopez
Jose Reyes

(b) Respondent limited the reinstatement rights of the employees listed in paragraph 12(a) above in the manner

described therein because they engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and because they had participated in the strike, in violation of Section 8(a)(1) and (3) of the Act.

13. (a) From on or about April 24, 1980, to on or about June 19, 1980, Respondent failed and refused to make an offer of reinstatement to employee Elpidio Cortez.

(b) Respondent failed and refused to make an offer of reinstatement to Cortez, as described in paragraph 13(a) above, because he engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and because he participated in the strike, in violation of Section 8(a)(3) and (1) of the Act.

14. (a) Since on or about April 24, 1980, Respondent has failed and refused, and continues to fail and refuse, to make an offer of reinstatement to employee Armando Escandon.

(b) On or about June 19, 1980, Respondent discharged employee Escandon.

(c) Respondent failed and refused to reinstate employee Escandon, discharged him, and continues to fail and refuse to reinstate him to his former position of employment because he engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and because he participated in the strike, in violation of Section 8(a)(1) and (3) of the Act.

15. (a) On or about June 10, 1980, Respondent discharged employees Antonio Andrade, Alejandro Arroyo, David Coronado, Ricky Craft, Enrique Figueroa, Lorenzo

Franco, Mickey Lambright, Jesus Valdez and Frank Zamora.

(b) Since on or about June 10, 1980, Respondent has failed and refused, and continues to fail and refuse, to reinstate the employees named in paragraph 15(a) above.

(c) Respondent discharged, and has failed and refused, and continues to fail and refuse, to reinstate the employees named in paragraph 15(a) above to their former positions of employment because they engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, and because they participated in the strike, and that such conduct was violative of Section 8(a)(1) and (3) of the Act.

16. (a) On or about August 6, 1980, Respondent required of employee Jesus Valdez, as a condition to his right to reinstatement to his former job or position, that he

execute a work application form and take a physical examination as required of new employees.

(b) Respondent imposed conditions on employee Valdez in the manner described in paragraph 6(a) above, because he engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and because he participated in the strike, in violation of Section 8(a)(1) and (3) of the Act.

17. (a) On or about August 7, 1980, Respondent required of employee Valdez, as a condition to his right to reinstatement to his former job or position, that he execute a form stating that he understood and agreed that he was returning to work as a new employee.

(b) Respondent imposed the condition on employee Valdez in the manner described in paragraph 17(a) above, because

he engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and because he participated in the strike, in violation of Section 8(a)(1) and (3) of the Act.

18. Respondent, acting through T. Simovich, in order to discourage its employees from engaging or participating in the strike and other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in violation of Section 8(a)(1) of the Act:

(a) On or about October 17, 1979, at its facility located at 2423 Troy Street, threatened to have employees participating in a picket line arrested;

(b) On or about November 2, 1979, at its facility located at 2423 Troy Street, promised striking employees increased

benefits if said employees abandoned the strike and returned to work;

(c) On or about November 23, 1979, at its facility located at 2500 North Rosemead Boulevard, threatened to have employees participating in the strike arrested;

(d) On or about December 15, 1979, at its facility located at 2423 Troy Street, threatened employees with terminations for participating in the strike; and

(e) On or about January 8, 1980, at its facility located at 2500 North Rosemead Boulevard, threatened employees with arrest for participating in the strike.

19. On or about December 14, 1979, Respondent, through Larry Larson, at its facility located at 2423 Troy Street, threatened to run over employees on a picket line with a forklift, in violation of Section 8(a)(1) of the Act. Also involved in this

allegation is the question of whether Larson is a supervisor within the meaning of the Act.

The Respondent, as indicated hereinabove, admits certain allegations but denies that it committed any violations of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which were timely filed, have been carefully considered.

Upon the entire record, including especially my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of the Company

The Company, a California corporation with its office and manufacturing facilities located in South El Monte,

California, is engaged in the manufacture of forklift trucks. Respondent annually purchases and receives goods and products valued in excess of $50,000 directly from customers located outside the State of California, and therefore is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

It is admitted in the pleadings that the Unions have been, at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. Preliminary Matters

A. Motion to Strike Testimony

On January 28, 1981, Respondent served a subpoena duces tecum, returnable February 3, 1981, upon the Local Union's office manager, requesting "any and all diaries, notes, memoranda, correspondence, transcripts, records, or other writings

relating to the United Auto Workers, Local No. 509 meetings during October and November of 1979 regarding the strike at Champ Corporation."

The service of this subpoena was initially mentioned by Respondent's counsel at the hearing on January 29, 1981. Counsel for the Unions[5] represented that he was just furnished at the hearing a copy of the subpoena and was trying to contact the proper Union authorities, and he further stated "... there's no reason for us not to furnish them the requested material." The Counsel for General Counsel and Charging Party, the same day, January 29, proffered as witnesses Ralph Gazzigli and Mary Garcia, International business representatives for the Union. Gazzigli had been assigned to negotiate the

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[5] There was some confusion exhibited on the record as to who is the Local Union's custodian of records.

first contract with Respondent after the certification was granted and Mary Garcia was to assist him. At the time of this proffer, neither Gazzigli nor Garcia currently worked for the Union which is a factor considered in making credibility findings. Garcia retired on October 18, 1980. Gazzigli was seriously injured in an automobile accident on July 24, 1980, and was subsequently placed on medical disability until January 1981, when his employment was terminated. Therefore, there is no basis to infer that their testimony was weighted in favor of their employer. In fact, based on demeanor, clarity of recall and the candor they exhibited, their testimony is credited.

The International Union, in late October 1980, assigned Gazzigli's negotiating duties to Francis Burkhardt. Gazzigli turned over his negotiating notes to Burkhardt and kept his personal notes relative to strike

activity at his home. Gazzigli believes that he took some notes at a November 5 Union membership meeting since he usually took notes unless another individual was observed taking notes. Mary Garcia stated she took some notes and gave them to Gazzigli. These notes were not found. Gazzigli further testified about the events which occurred at that meeting. He stated that the Union did not have an individual assigned to take notes at membership meetings but he usually noted the date of the meeting, the members of the Union's negotiating committee present and the general topics of discussion. Gazzigli further opined that any notes that he had taken during the period covered by the subpoena would have been at his office in a folder on the table behind his desk. Gazzigli searched the material he had at home but could not find any material that was

subject to the subpoena. He also searched his former office, to no avail.

On February 27, 1981, Respondent's counsel asserted that the January 26, 1981 subpoena was its second attempt to acquire the material, that in December the Union refused service of a subpoena, representing that Henry Fenton, the Union's counsel, was the custodian of records.[6] By letter of March 4, 1981, counsel for Respondent requested the Regional Attorney of Region 31 to commence enforcement proceedings to effect Union compliance with the subpoena duces tecum "pursuant to Section 102.31 of the Rules and Regulations of the National Labor

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[6] It is noted that Respondent apparently did not rely on this asserted representation since no effort was made to effect service upon Fenton and service was effected upon the Union at the Union's offices. No testimony or other evidence probative of this assertion was introduced into evidence.

Relations Board." This request was reiterated by a telegram of March 11, 1981 and by letter dated April 13, 1981 sent to Joel Martinez, Counsel for General Counsel. General Counsel did not reply to these requests. Respondent had adequate time to request action from the Board, but did not do so and no reason for this failure was advanced to the court.

Burkhardt, pursuant to the subpoena duces tecum, searched Gazzigli's office[7] and a storage room in the attic of the Union hall. Burkhardt also asked Thomas Whalen, an auditor for the Union, if he had any documents. Whalen had some material which

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[7] This search encompassed going through the desk including desk drawers, the two filing cabinets, a briefcase, a box used for storing papers, a credenza and all loose papers. Gazzigli's office was redecorated and the effects contained therein were placed in a hallway for a period of time during the redecoration.

was given to Burkhardt and thence to Respondent.

By telegram dated May 18, 1981, Respondent requested that the Administrative Law Judge strike all the testimony presented by the General Counsel and the Union concerning a Union membership meeting held on November 5, 1979, "unless General Counsel makes a timely motion to enforce the subpoena duces tecum."[8]

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[8] It is noted that from the inception of the discussions regarding this subpoena, Respondent was informed that enforcement of subpoenas is a matter lying solely within the discretion of the General Counsel or his agent. See National Labor Relations Board v. Duval Jewelry Company of Miami Inc., et al., 257 U.S. 1 (1958), regarding the Board's authority to delegate its authority for subpoena enforcement pursuant to Section 11(2) of the Act and Section 102.57(c) of the Board's Rules and Regulations, 29 CFR 1958. See further N.L.R.B. v. C.E. Strickland and Billy Sturdevant, 220 F. Supp., 661 (D.C. Tenn, 1962). See generally, Ralph Wilmot v. David Doyle, 403 P.2d 811 (C.A. 9, 1968) and cases cited therein.

As previously found at hearing, the evidence of record will not support a finding of willful refusal to comply with the subpoena or a bad faith effort in the searches. Respondent further asserts that it was denied due process by the General Counsel's failure to seek enforcement of the subpoena since it was denied an opportunity to adequately defend against the charge that events at the November 5, 1979 meeting are probative of the conversion of the strike from an economic strike to an unfair labor practice strike. This contention is found to be without merit based upon the preceding finding, and the fact that the Charging Party made available to Respondent, over an extended period of time, all witnesses who were connected with the event. Accordingly, it is concluded that the motion to strike testimony should be, and it is hereby, denied.

B. Petition to Revoke Subpoena

On March 10, 1981, Respondent had served upon the Charging Party's office manager, Carmen Garcia, a subpoena dated March 9 which was addressed to Francis J. Burkhardt requesting that he bring with him and produce on March 11, 1981 the following:

> Any and all diaries, notes, memoranda, transcripts, records, or other writings, describing or recording collective bargaining negotiation sessions between Champ Corporation and U.A.W. Local 509.

Burkhardt, in testimony given on March 30, 1981, asserted that he did not know of the subpoena. The date of knowledge of service is construed herein as the date of service for the purposes of determining timeliness of filing motions to revoke the subpoena. See N.L.R.B. v. C .E. Strickland and Billy Sturdevant, supra, On the same day, March 30, 1981, counsel for Charging

Party made a timely motion to revoke the subpoena.[9] Counsel for General Counsel also moved to strike the subpoena based on the contention that the required material was irrelevant. Furthermore, even if the petition to revoke is assumed for argument's sake, to be late and therefore not in strict conformance with all the Rules and Regulations, Respondent was afforded more than adequate opportunity to correct the

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[9] Section 11(1) of the Act contains the following provision respecting the revocation of subpoenas:

> Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

failing found in the subpoena and did not do so. Accordingly, it is found to be not prejudiced by consideration of the petition to revoke because it was overly broad and requested irrelevant material. See Howard Johnson Company, 250 NLRB 1412 (1980). Subsequently, on April 1, 1981, counsel for the Charging Party filed a written motion to revoke the subpoena because at the time of service no witness fees were tendered and the subpoena is overly broad and requests irrelevant material.

The failure of Respondent to tender appropriate witness and mileage fees at the time of service renders the subpoena defective on its face. See Rolligon Corporation, 254 NLRB No. 4 (1981), slip op., pgs. 4-5. Furthermore, the subpoena was overly broad inasmuch as it did not limit the request to times and materials clearly pertinent to this proceeding and the

requested materials were not shown to be necessary to the successful handling of the case. Jacobs Transfer, Inc., 227 NLRB 1231 (1977). Finally, it is concluded that failure to revoke the subpoena, insofar as it may be found relevant, would do unwarranted injury to the process of collective bargaining. As was stated in Berbiglia, Inc., 233 NLRB 1476, 1495 (1977):

> The basic reason for revocation of the subpoenas so far as here relevant was my view that requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. This

necessity is so self-evident as apparently never to have been questioned. The policy was recently adhered to by the Court of Appeals for the Ninth Circuit in Harvey's Wagon Wheel, Inc. v. N.L.R.B., 93 N.L.R.B. 3068, 3070, 78 LC paragraph 11, 268 (1976), an action under the Freedom of Information Act. The court there said:

> Statements of union representatives and agents of the employee, for example, should normally be protected from disclosure as a matter of law. Otherwise, the danger of their withholding relevant information for fear of exposing crucial material regarding pending union negotiations would be manifest. 22/

The subpoenas in the present case clearLy called for "exposing crucial material regarding pending union negotiations."

22/ The same policy in part underlies the long accepted privilege of conciliators not to testify concerning contract negotiations. See Tomlinson of High Point, Inc., 74 NLRB 681, 685 (1947): "[T]he parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding. . ." While the subpoenaed material may have relevance to the question of whether the strike was converted to an unfair labor practice strike, General Counsel has the burden of proving the allegation. Witnesses were called by General Counsel for the purpose of meeting that burden who were ably cross-examined by Respondent. All notes or memoranda found by the Union in response to the January 28, 1981 subpoena were appropriately turned over to Respondent. In

the absence of any reasonable showing that the material sought in the March 10 and January 28 subpoenas contained any reasonably probative evidence establishing that the alleged unfair labor practices engaged in by Respondent played no decisive role in prolonging the strike, that events other than the November 5 meeting were also instrumental in unduly prolonging the strike, "the statutory purpose of fostering collective bargaining," cojoined with the overly broad nature of the subpoena and the fact that the March 10 subpoena is defective on its face, leads me to grant the motion to revoke the March 10 subpoena issued on behalf of Respondent,[10] insofar as it seeks production of evidence. See Lewis, et al. v. National Labor Relations Board, 357 U.S. 10 (1958).

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[10] See Berbiglia, Inc., supra.

IV. The Alleged Unfair Labor Practices

A. Background

The Company manufactures a variety of rough terrain forklift trucks. As here pertinent, the following individuals are part of Respondent's managerial staff: Mike Simovich,[11] president; Tom P. Simovich, the general manager and treasurer, who has been training and turning over some of his responsibilities as chief operating manager to his son, Edwin Simovich,[12] the manager of corporate planning; Tom R. Simovich, Jr.,[13]

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[11] M. Simovich did not appear and testify. There is no evidence regarding his role during the period of time involved in these proceedings nor is there any allegation that he participated or was in any manner involved in the perpetration of the alleged unfair labor practices. M. Simovich owns about 50 percent of the company and his brother Tom owns the other 50 percent.

[12] E. Simovich commenced his employment as manager of corporate planning in March 1979.

[13] At times he was referred to as Tom Jr.

the chief engineer; Arvilla Shooter,[14] the office manager; Loren Peaslee, the purchasing agent; Richard Rowe, production superintendent; and Phyllis Lund, payroll clerk.

The Company's facilities were divided into three main locations, referred to as those located at 2500 North Rosemead Boulevard, which is the original production facility containing several buildings and many outdoor sheds and "overhangings; 2439 North Rosemead Boulevard;[15] and Troy Street, which is parallel to and west of Rosemead Boulevard, and is the location of a service department, several warehouses and other storage areas. These main locations were divided into approximately nine work areas.

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[14] Shooter did not appear and testify. No reason was advanced for her absence.

[15] The main office was located at this address as well as another production area.

Based upon the evidence of record, it appears that these departments or areas and their supervisors are, as of October 1979: the assembly area at 2500 Rosemead under the supervision of Herbert Shertz; the inspection area supervised by Peter Szalay; mast assembly at 2500 Rosemead supervised by Robert Smith; the machine shop at 2500 Rosemead supervised by Robert Peterson; the paint department at 2500 Rosemead supervised by Steve Garcia; the fabrication area at 2439 Rosemead,[16] supervised by Art Van Haasen; the assembly area at 2439 Rosemead supervised by Nick Ianello, which included an area referred to as the burning bay; the parts department supervised by Larry Larson; and the service department supervised by Ken Crutcher.

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[16] This area was further divided into a welding area and an assembly area.

Many of the various facilities were located in separate buildings many of which were divided by solid concrete block walls five to six feet high. These walls also separate Respondent's properties from the sidewalk. These walls contain breaks for entrances which generally have sliding chain link fences. The 2500 Rosemead facility has three such entrances but only one is used. The properties contain several parking areas. Rosemead Boulevard is an eight-lane thoroughfare divided by an island which contains plantings, both shrubs and trees. According to Tom Simovich, some of the shrubs are about a foot and one half high and the trees could be six to eight feet high. Some portions of the divider are absolutely clear of vegetation.

B. Supervisory Status

The evidence of record does not permit the drawing of clear lines of

authority to determine which individual had primary managerial authority at Respondent. Tom Simovich, in a deposition given in December 1980, indicated that he had sole responsibility for the hiring and firing of personnel. Ed Simovich indicated when he initially testified at this trial that his father still had primary responsibility for the operation of the Company including hiring and firing. According to T. Simovich,[17] since December 1980, pursuant to an understanding he had with E. Simovich when he commenced his employment with the Company in 1979, as soon as he was capable, he would

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[17] E. Simovich never explicitly asserted during his subsequent testimony that this was a formal understanding of the nature described by his father or that his authority greatly increased since the end of the strike. This lack of candor adversely impacts upon E. Simovich's credibility.

receive full and sole responsibility over the hiring and firing of personnel. Also, according to T. Simovich, since December 1980, Ed has exercised "much more authority." E. Simovich has hired everyone who has been employed by the Company after December 1980.[18]

Another area of contention is the supervisory status of Larry Larson. Larson

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[18] This statement is clouded by other testimony on the same date, April 1, 1981, by T. Simovich as follows: "Well, in general I would say that I have the - pretty much the last word with comments from Ed, my brother and Mrs. Shooter. I don't do thing [sic] with a - from a standpoint of a dictatorship." [Emphasis supplied.] The use of the present tense "have" in this quote indicates that T. Simovich had, as of April 1, 1981, ultimate authority over all managerial decisions but acquiesced to most of his son Ed's decisions. Accordingly, it is concluded that both Tom and Ed Simovich had shared responsibility in determining who would be hired and fired, which employees would be reinstated, when such reinstatements would be offered and the terms of the offers of reinstatement. Thus, the testimony of both father and son has pertinence regarding these matters.

testified that he has been employed by Respondent for approximately 5 years, and for the last 4 years he has been employed as parts manager. Larson did not testify further regarding his employment with Respondent. According to the uncontroverted testimony of Steven James Baugh,[19] Larson had authority to authorize leave-taking, would initial Baugh's timecard if he was late, and had authority to fire employees.

Section 2(11) of the Act defines a "supervisor" as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or

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[19] Baugh commenced his employment with the Company on June 1, 1976 in the parts department as a parts man. He went out on strike October 15, was active on the picket line and was a member of the Union negotiating committee.

> discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

These enumerated supervisory powers are to be read in the disjunctive and the presence of only one of the factors is sufficient to support a finding of supervisory status. N.L.R.B. v. Harmon Industries, Inc., 565 F.2d 1047, 1009 (8th Cir. 1977); N.L.R.B. v. Sayers Printing Co., 453 F.2d 810, 814 (8th Cir. 1971); James H. Matthews & Co. v. N.L.R.B., 354 F.2d 432, 434 (8th Cir. 1965), cert. denied, 384 U.S. 1002. Actual exercise of supervisory authority is not required for all or any definite part of the individual's time. As this Court has stated: "Section

2(11) does not require the exercise of supervisory power. It is the existence of the power which determines the classification." James H. Matthews & Co. v. N.L.R.B., supra, 354 F.2d at 434. Accord: N.L.R.B. v. Harmon Industries, Inc., supra, 565 F.2d at 1049.

Since Baugh's testimony that Larson has authority to fire, as well as to authorize taking leave, is not clearly and convincingly refuted, it is found that Larson has supervisory status as defined in Section 2(11) of the Act.

C. Collective Bargaining History

As previously indicated, in December 1978, the International was certified as the exclusive collective-bargaining representative for the unit described hereinabove in Case No. 21-RC1578. In January 1979, Respondent retained Edmund J. Hoy, Jr., a labor consultant, to lead its negotiating team which also included,

initially, Shooter, Van Haasen and possibly Ed Simovich. Hoy retained his affiliation with the Company at the time he testified. Shortly after the initial meeting to negotiate the first-time collective-bargaining agreement, the Company committee was reduced and was composed of only Hoy and Ed Simovich.

In addition to Gazzigli and Garcia,[20] the Company employees elected Frank Zamora, Manuel Avalos and John Gresko as committee members and also elected two alternatives; one, as here pertinent, was Steve Baugh.

The first negotiating session, Gazzigli believes, was held on March 7, 1979.[21] According to Hoy's uncontroverted

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[20] Garcia apparently did not participate in any negotiations.

[21] Hoy recalled the first meeting occurred on March 5, 6, or 7.

testimony, it was agreed that the non-economic issues would be decided initially. The Union gave the Company its initial-proposal in March 1979. Sometime in 1980, the Union gave the Company an economic and non-economic proposal which were tied together. The Company then went over the Union proposal item by item to ensure understanding and would, at subsequent meetings made non-economic proposals.[22] On October 15, 1979, a significant portion of Respondent's work force[23] commenced what was undisputedly, at its inception, an economic strike.

D. Pre-strike Activity

According to Deputy Gary Edward Stead of the Los Angeles County Sheriff's

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[22] Currently there are no negotiations occurring, and the last negotiation session was held in the fall of 1980.

[23] Baugh estimated that about 80-90 percent of the work force went out on strike.

Department, on October 3, 1979 he was instructed via a radio call to proceed to Champ Corporation to take a strike report. Stead met first with a woman he believed was Tom Simovich's secretary who indicated that they anticipated a strike and expected it to result in problems. Then, Stead met with Tom Simovich. According to the report, both the secretary and Tom Simovich indicated that there had not been any violence or vandalism but that there had been numerous threats of violence against some employees and their families. The report indicates that this was a generalized allegation and no individuals were named. Stead was given a previously prepared list of employees with the home addresses who were characterized as the "most likely to cause problems." These employees are: Frank Zamora, Enrique Figueroa, Lorenzo Franco, Jose Naranjo, Steven Baugh, Joe Solis, Jesus Moreno, Eduardo Ortiz and

Heriberto Valenzuela.[24] Stead cannot recall if Tom Simovich told him why he thought the listed individuals were the most likely individuals to "cause strike problems," why he opined that he suspected approximately 25 employees would cause problems, or why he expected the strike to commence on October 8, 1979.[25]

During the 3 or 4 years prior to this October 3 meeting, Stead had been occasional visitor to Respondent's premises

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[24] Tom Simovich did not deny submitting the list, which he asserts is not in his handwriting, but he could not recall the circumstances surrounding the preparation and submission of the list. Based on demeanor and Stead's superior ability to recall events, Stead's testimony is credited.

[25] Stead testified that he customarily would inquire, while preparing a strike report, if there were any individual who had or might engage in violence or threats of violence. However, he did not indicate such an inquiry was made in this case. In fact, his testimony indicates otherwise inasmuch as he stated that he believed the list had been prepared prior to his arrival, not in response to an inquiry he initiated.

to take reports of vandalism, petty theft or other law enforcement matters unrelated to the strike. The vandalism reports he previously received included such items as occasional broken windows in buildings, vehicles, cars being damaged by rocks and activities of that nature. According to Stead, the area of South El Monte where Respondent is located is subject to a pattern of vandalism because there are a large number of juvenile gangs present, primarily the El Monte Flores gang. Deputy Stead also testified that he studied gangs for the past 4 years and is presently assigned to the gang detail. According to Stead, the El Monte Flores gang "is indigenous to South El Monte," and is one of the largest gangs in that area, with an estimated membership of between 400 and 450 individuals.

According to Victor Castonguay, a mechanical assembler who worked during the

strike, several days prior to the commencement of the strike the employees were instructed by Tom Simovich and his foremen to report all incidents to management and the police. Castonguay followed this directive as did many other employees. Castonguay's testimony on this point is credited based on demeanor and lack of controversion.

E. Events Which Occurred During the Strike

1. General Matters

Deputy Stead also testified that he took 17 separate complaint reports during the strike including assault with a deadly weapon, and several reports of vandalism. In conjunction with this testimony, Deputy Stead also stated that although gang members normally did not participate in the picketing during the involved strike, he has seen several incidents involving gang members at the strike, asserting that he had personal

knowledge of 8 to 10 gang members at the strike location becoming involved in "physical altercations." He did not know if the gang members were employees of the Company or of one of the guard services employed by the Company, or if they were strikers, either one of which would account for their presence during the strike.

Deputy Stead based his belief that the gang members were affiliated with the Company or one of the guard services it employed because:

> I believe I stopped several members of the El Monte Flores gang in and around the area of Champ Corp. and they indicated to me that they were employed by Champ Corp., but did not actually see them actively engaged in working for the company. I pulled them over for traffic offenses and in talking with them asked what their place of employment was, and

several of them replied Champ Corp.[26]

Deputy Stead did not verify the gang members' representations that they were employed by Champ or a guard service working for Champ. However, other Sheriff's officers informed him that they observed known gang members performing guard services at Respondent's facilities. No representative of the guard service appeared and testified and these assertions are otherwise unrefuted.

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[26] Deputy Stead later testified that he encountered gang members working for a guard service that was employed by Champ, that he spoke with two or three gang members who indicated they were security guards for a firm hired by Champ Corporation during the strike. Furthermore, Deputy Stead took a report of a stabbing incident which appears to be the incident which occurred on October 19, discussed in detail hereinafter. One of the pickets was stabbed, apparently by one of three individuals in a vehicle who told Stead that they were members of the El Monte Flores gang.

Another Sheriff's deputy, Raymond Terhorst, was assigned by the Temple City substation to monitor all police reports generated by occurrences related to the strike, and communicated several times with Tom Simovich prior to commencement of the strike. There is no indication that these communications involved the strike. The first conversation Terhorst recalls which related to the strike occurred shortly after the strike began and merely involved a statement of the Sheriff's Department position regarding the strike, which was to remain strictly neutral. Terhorst does not believe that a weak went by without some discussion with Tom or Ed Simovich or Arvilla Shooter. Ed Simovich and Arvilla Shooter would call and inquire as to incidents that occurred during the strike, including the identity of all strikers arrested. The identity of all strikers arrested or named as

suspects was also requested by Respondent after the strike terminated, and Terhorst provided the information. According to Ed Simovich, whenever there was an arrest of a striker, inquiry was made of the Sheriff's Department regarding the details of the arrest. At times, Ed Simovich had reason to look up some arrest reports. Accordingly, it is found that Respondent had knowledge of the allegations contained in arrest reports and complaints filed with the Sheriff's Department during the strike. Furthermore, Ed Simovich and Arvilla Shooter kept a diary which listed by date allegations of wrongdoing by employees which could have been attributable to or which were asserted to be directly ascribable to the strike and/or specific strikers.

2. Some Events Occurring During the Strike Involving Guards

According to Baugh, a day or two after the strike commenced, while he was on the picket line late in the evening, he noticed two guards hired by Respondent who were armed with pistols, billy clubs and one was carrying a shotgun. As the guards were checking various gates, Baugh, who was wearing a picket sign at the time, started across the street and approached the guards. ". . . One of the guards chambered a round in the shotgun and pointed the gun at me and told me that if I came up on the sidewalk he was going to blow me away." Baugh informed them that he did not have any weapons, put his hands up and stood there until the guards left. Baugh then telephoned the police. The police came and arrested the two guards for carrying the shotgun without a permit. There

is no indication that the guards were disciplined for this infraction.

3. Some Occurrences During the Strike Involving Primarily Damage to Property

On October 15, according to Loren Peaslee, he had occasion to be in the drill shop and someone pointed out to him that a belt had been jammed into some drill presses. There were numerous other incidents of damage to Company and personal property during the strike. Some of these incidents included two successful attempts to contaminate two new fuel tanks installed by Respondent, one containing diesel fuel and the other gasoline. A few days after the strike started, the fuel tanks[27] were contaminated

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[27] The capacity of these tanks was the subject of various estimates by different witnesses. According to Peaslee, who was, as purchasing agent, the most knowledgeable, the tanks were a 6,000 and a 10,000 gallon tank. (continued...)

with dirt and sugar substances. Later in the strike, a garden hose was placed in the tanks to displace all the fuel. An aluminum storage container, approximately 15 to 20 feet wide by 40 feet long, used to store cardboard boxes was burned. No arson report was placed in evidence.

The offices and other facilities at the plant sustained the following damage: bullet holes through windows in upstairs offices, a rock was thrown through a plate glass window in the front of the main office, the "ladies lunchroom" had a window shattered, windows were broken in the purchasing office. Some instrument caused a hole in the door of the "60 X 60 building". From the commencement of the strike, padlocks and locks were plugged

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[27](...continued)
The water incident resulted in the loss of 4,000 gallons of diesel fuel and 8,000 gallons of gasoline.

with solder or plastics and locks were broken. Peaslee replaced 135 locks during the strike. No locks had to be replaced prior to the strike. A fence was pulled from the post in the parking lot at 2425 Rosemead about 3 or 4 days after the strike started. The gate next to the damaged fence was pulled off the rails about a week after the strike started. About a week and a half after the strike started, metal screws that affixed metal sheets to a portion of fencing were removed and the metal sheets were thrown in the driveway. During the first week of the strike, Nick Ianello, foreman or leadman of the chassis assembly department, also noted that tools were missing from the burning bay, items such as acetylene torches, grinders, parts of drills and fire extinguishers. Ianello also observed broken glass in front of the 2439 Rosemead building, by the fuel tanks which were contaminated and in the

parking lot in front of the office. Nails were placed in driveways. Rocks were thrown at cars and over fences into parking lots. Larry Larson stated that in late October he observed Carlos Almaroz throw a rock at Nick Ianello's car which struck the lower portion of the passenger door. Larson told Ed Simovich and Arvilla Shooter about the incident and appeared in court on the matter. Tom Simovich also asserted Almaroz threw a rock at Ianello's car. Almaroz denies the action. According to Tom Simovich, Almaroz was acquitted based on "an improper identification."

Most or all of the Company's vehicles were damaged and much of the damage occurred in October 1979. A white Freightliner had several flat tires, the air hoses were cut and on or about March 10 the windshield of the vehicle was smashed with a rock.

An International Harvester vehicle had a windshield broken and several flat tires, and a Chevrolet flatbed truck was similarly damaged. A "Chevy bobtail diesel truck" had a broken window on the driver's side plus numerous flat tires. A Chevrolet stable bed truck had several flat tires and the Company's two Chevrolet pickup trucks both sustained broken windshields. During the first few weeks of the strike, about 16 forklift trucks had flat tires.

With the exception of the Almaroz allegation, the above described damage was never attributed to individual strikers and there was no soundly based ascription of particular damage to the strikers rather than to the historical vandalism referred to by Deputy Stead as occurring in South El Monte, which he said was relatively frequent due to the number of gangs extant in that city. Accordingly, this testimony is considered

only as background and not probative of "good cause" failure to reinstate a particular individual, with the possible exception of Almaroz, as previously mentioned. These events, as well as those subsequently discussed involving alleged incidents that do not contain attributions to specific strikers or the Union are necessarily detailed to permit full and fair analysis of Respondent's defense that certain actions were taken due to the atmosphere of fear and intimidation extent during and after the strike.

Several employees and, according to Ed Simovich, some suppliers also complained of property damage which occurred at their homes, and this testimony will be treated similarly to the treatment accorded the evidence of damage at the Company's facilities. No evidence regarding complaints of property damage by suppliers was placed in

evidence and the unsupported allegation is inadequate to warrant attribution of this averred damage to the strike or individual employees. Also according to Ed Simovich, Arturo Nieblas,[28] complained that his pickup truck had windows shattered, tires punctured and sugar placed in the carburetor. The lack of probative details renders the bare allegation valueless in assessing the activities of strikers for there is no basis to ascribe the genesis of the incidents to the strike and/or strikers.

Nestor Lopez[29] asserts that on the first day of the strike, when he crossed the picket line, the picketers used profanity and

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[28] Nieblas worked with Nestor Lopez in the paint shop. He did not appear and testify. No reason was advanced for his absence.

[29] Lopez is currently a leadman in the paint department and was used at times by Respondent as an interpreter at the Company.

"told him that he could not come back the following day to work because they were fighting for something that they needed."[30] The record is replete with evidence that picketers used language exceeding billingsgate. Most individuals who remained working for Respondent denied using profanity; however the testimony of some of Respondent's witnesses and some of the picketers that the "employees" at least replied in kind is credited based on demeanor, inherent probabilities and consistency with the events.

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[30] One individual, David Coronado, assertedly said to him "it is better you see how they are treating you," and Lopez replied, "Well, if I can't come back to work then I won't come." Similar comments were made respecting the second time Lopez crossed the picket line. These comments were not explained or the evidence explicated in a manner demonstrative of the asserted threat and no threat is found.

4. The Events of October 16

The second day Nestor Lopez came to work, October 16, he again experienced "insulting" profanity yelled at him as he was asked "why he was coming to work, that they had already told him the day before to stop coming to work and to take precautions if he continued coming to work." Tom Simovich and Rudy Korste were allegedly with him but did not corroborate the allegation that threats were made. Whether this failure was due to language differences, since much of the profanity and other insults were said in Spanish, or for other reasons, is not clear on the record. N. Lopez did not identify anyone as the source of the threat the morning of October 16, 1979.[31] After work

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[31] According to N. Lopez, prior to the strike "he was accused of being a finger pointer of the Company. They had a bad opinion of him." The "they" were not identified.

on October 16, Ernesto Arroyo came to N. Lopez's house. According to N. Lopez, E. Arroyo inquired why he was going to work, and in response Lopez said that he had a family and could not afford to cease working. They then continued "talking like normal people." Lastly, N. Lopez claims he volunteered to cease working "if he couldn't go back to work." Arroyo assertedly replied that he had no objection to Lopez's continued employment at Champ but "did not know about the others, he couldn't control what the others would do." Arroyo then left.

It is then asserted that about half an hour after E. Arroyo left, another striker, Manuel Avalos, came to his house to tell him that he did not want him to go to work "for his own good." Avalos averredly stated that Lopez "should give the employees three days and they would arrange everything." The import of this statement

was unexplained. He said that he didn't have to worry about Avalos. Avalos also assertedly said that if Lopez continued working, it "could be big problems for him." Also present were the wives of Avalos and N. Lopez, according to N. Lopez. N. Lopez did not go to work the third day of the strike, asserting that he was afraid. He returned to work on October 19, 1979. When it was suggested that the presence of both Arroyo and Avalos could be explained by N. Lopez's activity of selling carnitas,[32] N. Lopez initially inferred that he had not engaged in this enterprise; however, later in his testimony he admitted that he sold carnitas made by a relative. Based on demeanor, the inherent improbability of making threats in front of Avalos' wife and in the presence of the wife of the individual ostensibly

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[32] A food similar to a taco, made with pork.

threatened, the demonstrated lack of candor and inconsistencies, the testimony of N. Lopez is not credited.[33]

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[33] N. Lopez also asserted that both prior to the commencement of the strike on October 16 and thereafter he and his wife received telephone calls threatening him and his family with "grave consequences" if he continued working. Further, on October 19 when he returned to work, unidentified picketers insulted and threatened him. He then claims that he returned to work on "the day of the candies", which the parties agreed to interpret as Halloween. The evening of Halloween, as he was returning home after taking his child trick-or-treating, he was told "that a pickup truck was surrounding his home." When he returned to his home, he found windows broken in his camper and the tires on the camper were flattened. Later that night, a rock broke a window in his house. He looked out the window, saw a car, three individuals, and rocks being thrown at neighbors' houses. He then asserts that he believes one of the culprits was a striker whom he could not name. If the perpetrators were strikers, the activity of throwing rocks at neighbors is unexplained. The assertion that a striker was involved was unwarranted considering N. Lopez's description of the event and his demeanor. N. Lopez then claimed he took his younger children and wife to Mexico, where he owns property, and they remained in Mexico until January 1980 when he, and evidently his family, returned to his California residence and he resumed work at

(continued...)

5. Other Events in October Where Damage Was Done to Employees' Property or Threats Were Made

William Gustaf Koskela testified that one evening in October while departing Respondent's premises a picketer threw a rock at the vehicle he was riding in as a

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[33](...continued)
Respondent. He did not state how many children remained in California, their ages or any other information which tends to diminish the credibility of his claim that the trip to Mexico was occasioned by fear due to threats by striking employees. Further, there was no showing that the damage to his property on Halloween was related to the strike rather than rowdyism associated with Halloween, juvenile gangs or any other cause equally likely. There is no assertion of any threats made by strikers or any else between October 19 and Halloween. Also the exact nature of the previously asserted threats was unexplained and cannot be attributed to and strikers or the Union based on this record. These general allegations, where no individual is mentioned, are solely included as part of the decision to permit full and fair analysis of one of Respondent's defenses and to further demonstrate the inherent inconsistencies and unsubstantiated, undetailed assertions of this witness's testimony.

passenger; the rock struck the side window where he was sitting, causing him to bump his head. Koskela also stated that in October or November, when he was in Nick Ianello's car as it was leaving the Company's premises, he saw Ruben Gutierrez throw a rock at the car. He did not see the object, he did not see any object impact the car, but he heard the impact. Also in the car was Dusty Holland. Shortly thereafter, he saw Gutierrez handcuffed. He never testified in court about the incident nor did Holland.

N. Ianello styled himself as a supervisor and was variously referred to as a leadman or foreman. According to Ianello, during the first month of the strike, the pickets would obstruct the driveway as he was trying to enter or leave the Company's premises and, when attempting to leave, would obstruct his view of oncoming traffic. The picketers would also curse at him, direct

"obscene gestures" at him[34] and make threats such as "we will get you." He asserts ingress and egress would be delayed for 5 or 10 minutes. Another picketer he identified as not liking him was Steve Baugh,[35] who assertedly said "we are going to get you. We are going to get you guys to really know what it is to feel like working in a real scab shop." Steve Baugh referred to himself as the "hit man." The significance of this appellation was not clearly explained by this witness. The use of nicknames was common at

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[34] Ianello identified Jose "Pinky" Naranjo as the picketer who engaged in "obscene gesturing," but this activity was not asserted by Respondent as a basis for denial of reinstatement.

[35] Ianello stated that prior to the strike he had trouble getting along with Baugh. He accused Baugh of stealing parts and giving "smart answers." It is noted that the witness acted in a hostile manner on cross-examination and he was uncooperative during cross-examination without just cause, demonstrating lack of candor.

the Company. The asserted threats were not alleged as a basis for failing to reinstate Baugh, but the use of the self-styled appellation of "hit man," according to T. Simovich, was a consideration in the decision not to offer him reinstatement.[36] T. Simovich considered Baugh a violent man, basically because of the language he used: "I'm the hit man. . . He wanted it to be known that he was the leader of the violence and in control of the men." When T. Simovich was asked if he ever saw Baugh engage in any conduct or physical activity at the plant, he responded "very shrewd man, did it all behind the scenes." The basis for T. Simovich's allegation regarding Baugh's conduct, therefore, is clearly not personal observation, and no other basis was advanced.

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[36] Respondent formally, on May 12, 1980, informed Baugh he was to report to work on May 16, 1980.

N. Ianello said his car sustained about $200 to $300 worth of damage while it was parked at Respondent. About a week after the strike commenced, he heard a loud noise as the car was exiting the Company property and he then observed a "ding" in the vehicle's right door. He then asserted the "ding' was in the right quarter panel. About a week later at the same exit, he heard an object strike his right rear window. This is the incident Koskela testified about. The right drip rail of the car had a "ding" in it about one-half inch in size. The witness was shown his Affidavit: "I don't know who kicked the door on the left quarter panel."[37] During his testimony he disavowed

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[37] Another inconsistency between Ianello's testimony and the affidavit is that he testified that he did not tell Counsel for General Counsel about the "ding" in the vehicle's drip rail but the affidavit states "When I got home, I looked at the car and found two dents in the right side quarter (continued...)

the affidavit, although admitting he signed it after reading the document. Based on inconsistencies in testimony, demeanor, lack of candor, and obvious bias, the witness's testimony is not credited. Furthermore, even assuming that the testimony is credible, Deputy Stead testified that prior to and not associated with the strike, he went to the Company in response to complaints regarding unknown vandals damaging vehicles on Company property by throwing rocks at them. Therefore, there is no basis to ascribe the asserted incidents to picketers.

Larry Larson testified that he saw Carlos Almaroz throw a rock at Nick Ianello's car. He stated he actually saw Carlos Almaroz with a rock in his hand. He saw him

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[37](...continued)
panel. The right side, the right door had a dent and the right drip rail had a dent."

move his arm and saw the rock hit the passenger side on the lower portion of the door. Larson then stated that he also saw Almaroz throw a bottle which struck the car. At the time Almaroz was with another picket and they were both throwing rocks. They did not have picket signs at the time. Ianello was pulling out of the driveway when he saw Almaroz throw numerous rocks and throw a bottle. Subsequently, Larson stated he saw them throw two rocks and a bottle.[38] The other picket was throwing rocks but he didn't recall how many rocks. When shown his affidavit, he stated he didn't recall seeing all the things that were included therein and when questioned about the fact that the throwing of a bottle, which assertedly also struck the vehicle, was not mentioned, he

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[38] Two rocks is much different than numerous.

stated that Counsel for General Counsel instructed him at the time the affidavit was prepared not to place that in the affidavit. Larson admitted that the affidavit was written in his own hand. Therefore, it is confusing why he did not recall many of the matters mentioned therein. He also did not recall stating in the affidavit that he was at the parts department loading dock by himself, about 75 yards distant, and could see three pickets. He had previously testified there were two pickets. He would not say that his memory was clearer when he prepared the affidavit than the day he was testifying. The affidavit was dated May 27, 1980. There was a subsequent affidavit evidently dated August 6, 1980. Larson testified on February 3 and 4 1981.

On further cross-examination, Larson then stated that the bottle struck the car on the lower portion of the passenger

door and he did not recall where the rock struck the car. This is contrary to his prior testimony where he stated that the rock struck the car on the lower passenger door panel. Larson admitted that when he testified at a trial involving charges filed against Almaroz because of the throwing of an object at Ianello's car, he did not tell the prosecutor that the bottle struck the car. Larson then stated that he didn't mention the bottle because he was told not to put the bottle in his deposition, but the prosecutor did not tell him not to mention the bottle. The deposition must be with respect to the charges against Almaroz because there was no deposition proffered in this case involving a prosecutor. There is no explanation as to why the prosecutor assertedly said the same thing that Counsel for General Counsel stated. Based on demeanor, the apparent inconsistencies in testimony and the apparent

lack of candor, it is concluded that Larson's testimony is not credible.

June Rose, a billing and rental clerk for Respondent, was threatened early in the strike. The first Sunday after the strike commenced, she was working at her residence, having taken a billing Rolodex home and she received a call that afternoon. A male caller told her "that I had better get the Champ billing papers and Rolodex out of my house or I would be threatened again or damage would be done to me." She did not recognize the caller. The following day, she took the work back to the plant. At 6:15 a.m. on January 4, 1980, her car was parked at a carport at her abode, and she noted glass fragments and paper all over the side and top of her car, the front window was smashed. She called A. Shooter who instructed her to call the Sheriff's Department. The authorities stated that it

looked like a pipe bomb "was used on the windshield." Later on in the year she found 11 nails in the left rear tire of her car. Apparently no arrests were made regarding any of these incidents and there is no direct description of culpability to strikers or the Union. Whether similar vandalism occurred in her neighborhood was not addressed in this trial. Therefore, there is no basis for attributing the incidents, other than the telephonic threat, to the strike at Champ.

Another apparent bomb incident involved Herbert Shertz, currently production assembly foreman. On February 21, 1980, while asleep at his home, he was awakened by an explosion. He ran to the front door after asking his wife to call the sheriff and saw smoke rising above his vehicle. Fire trucks were dispatched to his house, and they found evidence that a pipe bomb was placed underneath the vehicle near

or by the gas tank. Prior to this bombing, some time during the night both rear tires of his vehicle were flattened, "they were pierced with a sharp object." Other damage to his vehicle was a "ding" on the right door occasioned by someone hitting the right side of his car as he entered the work place. One unspecified day his landlord's car had a substance identified as paint remover poured on it while it was parked outside Shertz's residence.[39]

As previously indicated, Shertz also experienced picketers slowing ingress and egress from the plant by slowly walking

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[39] There were two or three other incidents mentioned in the testimony regarding the pouring of substances identified as paint remover on several vehicles of management and employees of Respondent. For example, Ed Simovich testified that a substance which damaged his car finish was poured on this vehicle one evening while he was attending a negotiating session.

across the driveways in close order file. The picketers would also yell at him using profanity, usually in Spanish.[40] The evidence clearly supports a finding that the picketers did engage in this activity. The two picketers he knew by name who were active during the first week of the strike were Joe Solis and Frank Zamora.[41] He could not recall what was said by these individuals, but claimed they were loud. No one threatened him during the strike.

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[40] Gerhard stated most of the cursing he heard was in English. Gerhardt's testimony is not credited based on demeanor and the fact that most of the individuals identified as the most active picketers were Spanish speaking individuals who needed the services of a translator when they testified. Gerhardt could not understand Spanish, and the inapposite character of Gerhardt's testimony to that of Shertz and others, such as Korste, was unexplained, further discrediting his evidence.

[41] Zamora had a good command of English; Solis did not.

As previously indicated, since many of these incidents do not contain sufficient evidence to permit ascription of culpability to a particular individual or the Union, they are presented only as factors relating to Respondent's defense to some of the above specified charges, and do not form the basis for finding the decision not to reinstate a particular striker justified under applicable Board law.

Other employees who, Ed Simovich asserts, suffered "bomb damage" at their homes were Victor Castonguay, Bob Peterson and Rudy Korste. Korste, a truck driver, not only reiterated the damage to the various vehicles discussed hereinbefore, but also detailed an occasion in December 1979 or January 1980 when he had one of Respondent's trucks parked at his residence. During the night he was awakened by "a big noise like a crash." When he later went to check the

truck preparatory to going to work, he found that part of the cab, engine and underneath the cab were damaged; all the hoses, electrical wires and electrical hoses were damaged as was the fuel pump. In March, after the truck was repaired, Korste, after he loaded the truck at the plant, left it for a few moments to get some tools located across the street and when he returned the windshield was shattered and a rock the size of a fist was laying in front of the truck. He does not know where the rock came from. Korste, in addition to describing the previously detailed picket line activity of the strikers, also stated that he saw Ramon Rodriguez frequently strike vehicles passing through the picket line with his open hand. He saw other picketers hit or touch the trucks he drove but he could not identify them. It is not alleged that the truck was damaged or that he was threatened by R.

Rodriguez or the others on these occasions. Also Korste claims that some pickets "made gestures at him" and Eduardo Ortiz once challenged him to a fight by approaching him with his hands closed in fists after calling him a profane name in Spanish. The action was interpreted as a challenge; no words explicitly challenging Korste to fight were attributed to Ortiz. Ortiz, though standing close to him, did not touch Korste, who is 5'10" tall and weighs 180 pounds. Ortiz appeared to be smaller than Korste. There were no complaints made to the duly authorized authorities relative to this incident.

Victor Paul Castonguay also worked during the strike as a mechanical assembler. On November 28, 1979, while sleeping, he was awakened by an explosion. After investigation, he noticed that his pickup truck, which was parked in front of his

house, was damaged; the windshield had a hole in it and other parts of the vehicle were damaged. He did not call the police but was able to drive the truck and reported the incident to Tom and Ed Simovich. As he was driving through the picket line the morning of November 28, 1979, Castonguay asserts that he was stopped by the pickets, and David Coronado just came up to him and spat in his face, pointed at his pickup and laughed. E. Ortiz also "once said where is your pickup?" and then laughed. There were no complaints filed or arrests resultant from these incidents.

Also, at the beginning of the strike, Castonguay asserted that while his car was in the driveway to the plant, Solis jumped up on the hood and pounded on the hood; that on Sunday, the third day of the strike, Solis approached him, pushed him with his shoulder and elbowed him, called him a

profane name, and told him not to go to work. Castonguay was knocked off balance but did not fall down. He proceeded to cross the boulevard with coworkers who usually tried to cross in groups, and Solis was in the middle of the group of non-strikers. About 10 seconds later, Castonguay was hit on the back of his head or in the neck area with a bottle. He was taken to the hospital by Ed Simovich where he was given heat treatments and a neck brace. He wore the neck brace for two weeks. Castonguay, consistent with the instructions he received prior to the strike from Tom Simovich, reported the incidents to Ed Simovich. No charges were filed or arrests made with regard to these incidents. Prior to the strike, Castonguay had an argument with Solis accused Castonguay of stealing his fan. Castonguay then modified his testimony and stated that Solis thought he stole the fan and was willing to go out

and fight unless Castonguay "came up with the fan." Castonguay purchased a fan and gave it to Solis. Castonguay claims that he never held a grudge as a result of this incident.

Robert Peterson, currently a mechanical foreman, stated that on November 17, 1979 at 3 a.m. he was awakened by an explosion. He looked outside and saw what appeared to be a piece of crockery laying outside the house and smelled gunpowder or explosives. He went back to bed. The following morning he investigated and saw damage to the front of his van,[42] and a hole six to eight inches square blown through a gate where he keeps trash cans. There was a piece of pipe driven into a block of wood. He called the Sheriff's Department, reported the incident and, in response to an inquiry if anyone threatened him, said Ernesto Arroyo

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[42] A pit in the windshield.

was the only person who had been around. Arroyo had come to Peterson's house prior to the strike, but pursuant to invitation. About 2 weeks after the strike commenced, Peterson asserts that Arroyo came to his house and talked to Arroyo's wife. Peterson claims that his wife said Arroyo told her that there was danger for Peterson, that his home might be destroyed or bombed or something might happen to his property. Peterson did not directly refute Arroyo's claim that he went to Peterson's home several times before and after the strike uninvited and that he was historically hospitably received. Bob Peterson was his foreman, and he would borrow tools and Arroyo had fixed Peterson's car. Arroyo and his wife and the Petersons dined together both at restaurants and at Arroyo's home. Arroyo admitted being at Peterson's home about 2 days before the

explosion but denied making any threats against Peterson or his property and denied requesting Peterson not to work during the strike. Arroyo stated that he does not have any knowledge as to who caused the explosion. Arroyo was not charged with any crimes in connection with the explosion. Peterson discussed the incident with Ed Simovich. Peterson's wife did not testify and the hearsay character of Peterson's testimony greatly diminishes its credibility. Further, attribution of involvement is also unwarranted based on Arroyo's unrefuted testimony that Peterson and his wife socialized with Arroyo and his wife and unannounced visits to the Peterson residence were normal prior to the strike.

A few days after the explosion, Arroyo went to Peterson's home mentioning that the Sheriff's Department had interviewed him. According to Arroyo, Peterson showed

him all the damage and Peterson was laughing as if nothing happened, and said that nothing could be done about it. Peterson did not controvert this testimony by Arroyo.

Other damage suffered by employees and supervisors who continued working during the strike included flat tires, damage to the paint on vehicles, eggs thrown at buildings, and nails in the streets. Harry Martin Keown also had two gunshots fired at his house. The incident happened the evening after he quit his employment. Keown stated he quit because of harassment by Steve Baugh and Joe Solis who repeatedly said very profane things to him and Steve Baugh would, during the first week of the strike, repeatedly say to him, "Harry, your house is burning, Harry, your house is burning." Baugh would also say, "I am the hitman," and, when Tom Simovich was present, Baugh would say, "Tom, we love you. All we want is a contract."

Keown started working for Respondent about 2 weeks after Baugh in 1976 and exhibited a longstanding dislike for Baugh, stating that Baugh had a reputation as a big mouth.

The second day of the strike, Keown observed Baugh and an individual named Ernie obstruct the entry of a UPS truck and ask the driver to honor the picket line. The driver left. Another truck driver for Airborne, an air freight delivery service, was also prevented from entering the plant that day. Keown returned to work prior to the cessation of the strike. Baugh and Solis were not arrested as a result of these alleged incidents and there was no showing that any strikers or Union officials were implicated in the gunshot incident.

Charles B. Davis, a current employee of Champ who commenced employment in March 1977 and continued working through the strike, had his car damaged in the Company

parking lot in November 1979. The car had pock marks just below his window and he noted rocks laying beside the car. On another occasion he observed a forklift that he tried to start was missing the battery. He then investigated further and saw that a drive tire on another forklift was flat and that there was part of an ice pick sticking out of one of the drive tires. The ice pick had no handle. Another forklift had a battery missing.

Approximately 2 months after the strike commenced, Davis found a pock mark on the side of his house and, upon further inspection, saw a ball bearing on the ground. He, on two other occasions, had holes in front windows of his house and after investigation found ball bearings. He called the police and made a report but there were no arrests and no individual was identified as the perpetrator. Also the day after the

first incident, Davis reported the matter to A. Shooter.

Davis asserted that several of the strikers threatened him. He alleged that prior to the strike Ruben Gutierrez ". . . told me how could I work and watch my kids at the same time." During the strike Ortiz called him profane names and Joe Solis threatened him, stating "you are dead, you fat son of a bitch." Ortiz also assertedly said, "We'll get you," and "paybacks are a bitch." Davis interpreted this last statement to mean they would find some way to get him. The witness noted that the strikers during picketing tried to impede ingress and egress to the plant almost all the time and that the same group of approximately 10 strikers were most active in this regard. He recognized among this group of "active" strikers Joe Solis, Ruben Gutierrez, Herbiberto Valenzuela, Jesus Moreno, E.

Ortiz, A. Cortez and Ernesto Franco. He could not recall what Moreno said or when he said it. He does not know whether Heriberto Valenzuela ever threatened him. Other damage sustained to his property during the strike was to his mother-in-law's car. On one occasion nails were placed at the end of his driveway in the gutter stuck in cardboard which penetrated his mother-in-law's tire and caused a flat.

Davis denied doing anything that might provoke the pickets and stated he did not remember ever giving "a finger" to the pickets. After further examination, he admitted that he had a sign placed in his truck to be visible as he passed through the picket line which had a picture of a hand "giving a finger." The sign also referred to the UAW. Davis also denied ever saying anything to the strikers. As previously indicated, the credited testimony was that

employees who continued working during the strike did at times make profane or otherwise inflammatory statements to the picketers. Davis, after stating he did nothing to provoke the pickets and then admitting that he had the sign placed in his window, modified his testimony and stated he usually did not say things to the strikers as he was driving through which indicates that be had on occasion said things to the strikers. He then testified that he just could not recall saying anything to them. Subsequently, after further examination, he admitted he did say things back to them occasionally; he recalled saying "to go to hell." He could not recall using any obscenities when he talked back to them. Davis was never admonished by management regarding the sign in his van or his making statements to striking employees. Representatives of management were stationed at the gates when employees were entering and

leaving, supporting an inference that Respondent knew of Davis' sign and some of his comments while crossing the picket line. There was no explanation why the Company countenanced his sign while taking umbrage at what Respondent classified as obscene gestures by striking employees. The witness's inconsistencies in his responses does impair his credibility. It is noted that Davis does not speak Spanish. It is further noted that Davis approximated that 10 people were the same ones that consistently caused trouble.

According to the testimony of Richard Gerhardt, who is currently a leadman in the welding shop, objects were also thrown at six strike replacements early in the strike. The six replacements were commencing work for the first time when they had bottles and other objects thrown at them. Gerhardt could not see who hurled the objects because

the picketers were on the other side of a wall. There were about 15 pickets at the time and there was a lot of cursing, yelling and other loud noise. The language used again exceeded that of billingsgate. The picket line activity of slowing ingress and egress, the shouting and cursing and the use of expletives, caused Gerhardt to stop crossing the street after the strike commenced during and in the course of business because he would have to walk through two picket lines.

On recross Gerhardt stated the replacements had worked for 2 days and then he stated they came out of personnel, went across the street, and worked the whole day. He does not know whether they worked across the street. He only saw them at the facility for 2 days and then no more. He couldn't describe the car the six employees were allegedly using and he did not need them the

day prior to the incident or any day prior to the incident. Accordingly, it is unexplained how he could have stated that they worked for only 2 days, or inferred the basis for their departure was the improper activities of some of the striking employees. Gerhardt's obvious bias warrants discrediting this testimony.

Lorenzo Rincon stated that at the time the strike commenced he was a fitter. Rincon's position has not changed with the Company since the strike; he's currently a leadman fitter. Rincon observed the conduct of the pickets throughout most of the strike. He described their activities as engaging in a lot or swearing and cursing and engaging in profane gestures. After the picketers used the expletives, eventually some of the employees would return the comments some of the time also using expletives; occasionally one of the employees would hurl back some

curses. During the first week of the strike there were 50 to 60 picketers in front of the plant. At some point not identified on the record, an injunction was obtained which greatly diminished the number of picketers at each gate.

During the beginning of the strike, the picketers would frequently touch cars as they entered or left the different entrances to the plant. He saw Carlos Almaroz once lunge at a car and hit the rear windshield with his fist. He thought Almaroz was going to break his hand he hit the car so hard.

Rincon's testimony was substantiated by Art Van Haasen who does not speak Spanish. He noted that the pickets would use dirty words and obscene gestures so a to obstruct traffic. The pickets he recognized were Frank Zamora, Joe Solis Nicholas Bias, Ramon Rodriguez, Filiberto Ruiz, Alberto Cortez, Tony Andrade, Carlos

Almaroz and E. Ortiz. Van Haasen heard non-strikers shouting the same expletives back at the strikers. Van Haasen also stated, contrary to the testimony of Davis, that he never heard any shouting in English. He could repeat at the trial several Spanish obscenities due to the frequency they were overheard during the strike.

Loren Peaslee also testified about an incident early in the strike when he and Cindy Van Haasen[43] went shopping for groceries in a market approximately 2 to 3 miles from the plant as part of a normal practice of making sandwiches in the afternoon. After making their purchases, Peaslee and Cindy Van Haasen were returning to the car when, according to Peaslee, as he was getting into the vehicle an individual

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[43] Cynthia Van Haasen has been employed by Respondent as a purchasing secretary for more than 2-1/2 years and is the daughter of Art Van Haasen.

who worked at Champ said he was going to bomb Peaslee's car. Peaslee did not know his first name, he had to ask and was told it was Carlos. Subsequently Peaslee indicated that he did not know the name of the individual who said he was going to bomb the car but Cindy Van Haasen was the one who identified the individual. Peaslee reported the incident to Arvilla Shooter.

Cynthia Van Haasen testified that she knew Carlos at the time of the incident from contacts prior to the strike. Carlos Almaroz was the individual identified as the striker making the threat. Carlos was approximately 15 to 20 feet away from her and she did not know exactly what Carlos said but from what she recalled it was something about bombing Loren Peaslee's car. She knew Carlos was talking to Peaslee because he was looking at Peaslee. She did not recall what Carlos was wearing. She did not recall if he had a

moustache or a beard and stated she was looking away when she heard something. She wasn't looking at the individual but heard a statement about a bombing. She did not hear exactly what Carlos said. She further testified that she discussed the matter with Peaslee the day the incident occurred, recalled it was during the strike, and opined it occurred perhaps 2 months after the strike started. No police reports were filed with regard to the matter and no arrests were made. Carlos Almaroz denied threatening Peaslee. He recalled the incident, stating that he saw both Cindy Van Haasen and Peaslee at a supermarket during the strike but just said hello to Peaslee. Peaslee assertedly just waved his hand. Cindy Van Haasen stated she did not see Peaslee wave his hand which is understandable since she also testified that she was not looking at them at the time. Because of the statement that she was not

looking at Peaslee and Almaroz, it is confusing that she testified that Almaroz was talking to Peaslee because he was looking at Peaslee. Almaroz stated he was shopping for food with his family and had his wife and children with him.

Another employee who worked throughout the strike, Alfredo Cisneros,[44] also stated that he was threatened while crossing the picket line. The threats were "that we were going to be sorry. That we were going to be sorry because they were going to come and bother us at our homes." Accused of making those statements by Cisneros were Joe Solis and another individual called "the dog." As previously indicated, there was extensive use of nicknames by employees. "The dog" was subsequently identified as Eduardo Ortiz.

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[44] Cisneros operates a drill in the forklift department.

Other employees accused by Cisneros of making threats were individuals called "the fireman" and "the female pig" or "sow." When "the little fireman" was used as translation, the witness said that that was incorrect, but the only identification was of an individual called "the little fireman," who was later identified as Armando Escandon. Jose Naranjo, who is known as "Pinky," was also identified as having the nickname "the sow." Cisneros further stated that the pickets used profanity toward individuals crossing through the line. Whether the individuals named were accused of using profanity only or of using profanity and threatening employees was unclear on the record. When the pickets yelled at him, Cisneros admitted to yelling back but he denied ever calling them "bad names" or using profanity.

Rene Gonzales, an employee at Champ since May 1978 who continued working through

the strike as a welder, testified similarly to Cisneros and appeared to commute to and from the plant with Cisneros. He identified those strikers using profanity at times in a threatening manner as Carlos, Jose Villavicencio, "pig," Thomas, Ortiz, Ramon and others whom he could not recall at the moment. He identified Carlos as an individual who had on a green T-shirt. Carlos Almaroz assertedly wore a green T-shirt with great frequency during the strike.

Another incident that was the subject of testimony during the first week of the strike involved Freddie Vallejos who said he was performing his duties as a receiving clerk's helper driving a forklift when a rock was thrown over a fence and hit the vehicle he was driving. No one was identified as the perpetrator. Another rock-throwing incident, as previously indicated, involved an employee

by the name of Frank Day. According to Frederick Bruce Gary, who, at the commencement of the strike, was employed by a guard service,[45] he saw Ruben Gutierrez throw a rock which struck the right side near the rear portion of an automobile driven by Frank Day. Gary took Gutierrez into custody and held him for the Sheriff's Department.

On cross-examination, Gary was shown his affidavit which stated that he saw a picket throw a piece of concrete at an employee's car and that the rock struck the car. The affidavit also asserted that as far

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[45] Gary was subsequently hired by Respondent as a truck driver at a higher salary than he commanded as a guard working for Swale Guard Service since 1974. Gary commenced his employment with Respondent in December 12, 1979. His rate of pay when he commenced his work for Champ was $6 an hour as a materials handling coordinator, truck driver. About 3 months after he started he got an increase to $6.25 an hour. And at the time of his testimony in February 1981, his salary was $6.85 an hour.

as he knew, the picket who threw the rock was Leroy Zook or Frank Day. Gary admitted having read the affidavit prior to subscribing to it and stated that the affidavit was wrong, asserting that "maybe it was transcribed wrong." Since the affidavit was signed subsequent to transcription, the evidence indicates that Gary's testimony is not credible. This conclusion is buttressed by further testimony upon cross-examination where Gary admitted he never met Ruben Gutierrez at the time he claims Gutierrez threw the rock. He never saw him before in his life. As a matter of fact, he could not recall who, but someone told him at the time that it was Ruben Gutierrez who threw the rock. He believes he was informed of the identity of the perpetrator the day after it occurred. Gary claims that the identification was made when he described the individual who threw the rock. Based on

demeanor, later admission that he does not know the true name of the individual who threw the rock or an object at an employee's vehicle, and the unbelievable explanations and disparities between initial testimony, affidavit and subsequent testimony, Gary's testimony is found not credible.

6. The Events of October 17, 1979

On October 17, 1979, according to Baugh, he was picketing at 2424 Troy Street with Ricky Craft and Jose Naranjo, who is also known as "Pinky." Tom Simovich came out of the gate just north of the pickets, passed them, then turned and called "Pinky", saying "Pinky, you might as well go home. You don't work here anymore." Baugh then said, "What about me, Tom?" Tom Simovich assertedly replied, "You're fired, too. You might as well go home." As he returned through the gates, he again turned around and said, "If you stay here, I'm going to have you

arrested." Baugh inquired why they were fired, but T. Simovich "kept going. . . He did not reply." Baugh told T. Simovich that he still loved him, that "we just want a contract."

According to Jose Naranjo, on October 17, 1979, while picketing with Steve Baugh and Ricky Craft, Tom Simovich came out of the plant and said:

> "Hey, you. You, Pinky. You got something in there?" "No, sir. Orange juice." He said, "Okay, because you never be back." "Oh, really? You mean I am fired?" "Yes." "Okay, thank you." Then Steve Baugh asked "Hey, Tom what about me?" Tom said, "You, too." Then he went into the plant and stopped and then told us, "You better go home, otherwise I am going to put you in jail." He does

not know how come he said that. All they were doing was walking the picket line. He does not know why he was fired.[46]

Tom Simovich denies having any conversation with either Baugh or Naranjo during the first week of the strike. Based on demeanor, clarity of recollection and

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[46] Ricky Craft's version is that on October 17:

> Tom Simovich came out and he was walking down the street, and he stopped and he told Pinky, (Jose Naranjo) he said, "Pinky, you may as well go home, you are no longer working for me, you have no business here anymore." And he was starting to leave and Steve said, "Well, what about me, Tom?" And he said, "You're fired, too, Steve, you have no business here, you may as well go," and he started to leave and he stopped and says, "As a matter of fact, if you stay here one more hour, I'll have you arrested."
>
> After that, Steve Baugh told him, "We still love you, Tom, and all we want is a contract."

substantiation, Tom Simovich's denial is not credited.

7. The Events Occurring on October 19, 1979

According to Ed Simovich, on October 19, 1979, the Company called the employees, primarily the strikers, to be present on that date in order to hand out the paychecks for the previous week's work. A white line was painted across the driveway at the 2500 Rosemead Boulevard entrance to the plant behind which the employees were to congregate to receive their checks. The assembly was called only for employees who were not working on October 19. Larry Rincon was assigned to assist Ed Simovich in dispensing the checks. Rincon had a checklist containing the names of the individuals that were to receive checks, their names would be called, the individual would step forward and they were required to

sign for their checks. It appears that shortly after Company officials started disbursing the checks, a red car entered the plant through the same driveway. The vehicle contained three or four individuals. They were on the Company premises to pick up Cindy Van Haasen, Art Van Haasen's daughter. One of the occupants of the car, the driver, Joe Sanchez, was identified without refutation as Cindy Van Haasen's boyfriend. It is noted that Cindy Van Haasen testified she was not asked any questions regarding the incident occurring on this date. Joe Sanchez was never called as a witness. The reason for these failures to testify about the events of the day was not proffered. It also appears that, as was particularly common during the early phases of the strike, the pickets started whistling and yelling at the occupants of the vehicle. Although the vehicle could turn around and exit with the

vehicle facing forward, the vehicle backed up and stopped in the driveway. The occupants in the vehicle and the individuals waiting for their paychecks engaged in name-calling and shouting. Joe Sanchez and the other occupants of the vehicle got out and an altercation commenced. Larry Rincon attempted to get Joe Sanchez back into the car but he pulled away. At some point, based on the credited testimony, one or more of the occupants of the vehicle yelled "Flores, here come the Flores," or something to that effect. Then, one of the occupants of the vehicle got into an altercation with Pedro Lopez and Lopez was stabbed. The wound was extremely severe. According to the testimony of Steven James Baugh, Ed Simovich and Dick Rowe then saw the police coming up and told the occupants of the red vehicle "get the hell out of here." With that, the occupants jumped into the car, including Cindy Van

Haasen, and left the scene. There is no indication that the Company questioned Cindy Van Haasen about the incident.

Ed Simovich denies being present. It is unrefuted that Simovich was disbursing the checks immediately prior to the incident. Pedro Lopez recalls seeing Ed Simovich immediately prior to being stabbed. There would be no basis for Ed Simovich to commence handing out the checks and then all of a sudden disappear. Based on demeanor and inherent inconsistencies and probabilities, Simovich's denial is not credited.

The stabbing incident, as well as the melee in general, was investigated by Deputy Gary Edward Stead, who stated that Cindy Van Haasen was picked up by her boyfriend who he believes was in the Marines and approximately two or three other Mexican individuals. He also stated that at least two of the occupants of the vehicle were

members of the "Flores" and that the occupants of the car told him that they were members of the El Monte Flores, which was the gang described previously herein. According to Deputy Sheriff Terhorst, Jose Ruiz, Sanchez and Freddie de la Cruz Vallejos were arrested in connection with the incident. The investigation by Terhorst indicated that they were not involved in the stabbing and he wrote on the arrest report the word "exonerated" next to each of these names and informed either Tom or Ed Simovich that those individuals had been exonerated in the stabbing. An individual by the name of Michael Hurado was ultimately charged with the crime. Joe Sanchez has subsequently been hired by Respondent. His participation in the fracas apparently was not a bar to his employment as a replacement for striking employees.

Also arrested on October 19 was Jose Padilla, who was accused of committing a battery in violation of Section 242 of the Penal Code by Darren Keith Finney, a security officer. Finney did not appear and testify. Padilla stated that after observing Pedro Lopez being hurt, he had a Polaroid camera and took three pictures, including one of the license plate of the red vehicle. Padilla, who is diminutive in stature, being approximately 5'7" tall and weighing about 157 pounds, stated that the guard came to him and grabbed away the photograph of the license plate without Padilla's permission. When the guard took the picture out of Padilla's hand, Padilla inadvertantly bumped him with his elbow and yelled at him as he was running off with the picture that he should give the picture back. According to Padilla's uncontroverted testimony, the security officer at a later date indicated to

him that he was sorry that he filed the charge and wanted to dismiss it. The security officer, Padilla observed, went over to the district attorney indicating he did not want to proceed, that he wanted to have the matter dismissed, which it was.

Also arrested that day was Ramon Rodriguez. Rodriguez was arrested for engaging in a fight with Freddie Vallejos. According to Rodriguez, Vallejos jumped him twice during the same melee in which Pedro Lopez was stabbed. Vallejos admitted that he had a grudge against Rodriguez because, he asserts, Rodriguez on the first day of the strike kicked the side of Vallejos' car as it was proceeding through the picket line. Vallejos admitted strongly feeling the insult of the kicking of his car and he would see Rodriguez every day screaming invective and profanity at him. Rodriguez stated that he and Vallejos during the first week of the

strike shouted at one another frequently when Vallejos passed through the picket line. Vallejos also admitted that his ire did build up and that he did tell Rodriguez that because he kicked his car he was going to get him. He meant this as a personal threat to Rodriguez. He also admitted that at one point Rincon and Rowe pulled Vallejos off Rodriguez and wanted him to cool it and he managed to go back and hit Rodriguez again. The charges against both Vallejos and Rodriguez were "dropped" at the police station on October 19, 1979.

Larry Rincon stated that the only time he saw Vallejos was when four individuals were on top of him holding him down, that he didn't see Freddie Vallejos fighting with anybody and did not pull Vallejos off Ramon Rodriguez. He did not know whether Vallejos was arrested that day or not, but he knew that Vallejos was

currently working for the Company. Rincon's version is so disparate of Vallejos' where Vallejos admitted his culpability in the matter that Rincon's testimony cannot be credited.

Vallejos was arrested approximately 2 months after the October 19 incident. The second arrest was for trying to hit somebody with an ax handle. Vallejos explained the incident as occurring after some unknown individual or individuals flattened all the tires of his vehicle with an ice pick and threw brake fluid all over the car. He went to work the following day in a friend's vehicle and, as they were driving into Champ, their entry was obstructed and Eduardo Ortiz inquired where his car was. Ortiz denied inquiring about the car. Vallejos, admitting that he was already quite irate, rolled down the window and spit at Ortiz. He then stated that Pinky Naranjo approached the vehicle

carrying a stick and hit the top of the hood, not to make a dent but to let them know he had a stick. Then when he walked toward Vallejos' side, Vallejos spit on Naranjo. Vallejos thought he was going to be jabbed with the stick and since he had a hatchet in the vehicle because he made firewood out of dunnage, he picked up the hatchet but stated he did not swing the ax at the man. He was charged with brandishing a weapon but the charge was dropped. He was also charged with spitting at the picketers, which was a misdemeanor. He was found guilty of the misdemeanor and was placed on probation. He was verbally told after both the Ramon Rodriguez incident and the spitting and ax incident to keep control of his temper. He was never placed on probation or otherwise disciplined by the employer for these activities. In fact, Vallejos received a promotion.

8. The Events of October 23, 1979 and the Granting of Additional Days Off

According to Tom Simovich, on October 23, 1979 he had a conversation with Sam Munoz in the morning. Munoz was the head of a guard service that was engaged to protect the plant with guard dogs the second day of the strike.[47] Munoz averredly stated that the guards heard discussions the preceding evening among the picketers that there was a contract on Tom Simovich's life. No names of picketers or guards were assertedly mentioned by Munoz. Tom Simovich asked if any specific names were ascertained but was told it was just a general conversation.

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[47] Munoz was still retained by the Company as of the date Tom Simovich testified, April 1, 1981. Munoz did not appear and testify. No reason for his failure to testify was advanced by any party.

That same day, avers Tom Simovich, Joe Solis twice threatened him. The first asserted threat occurred in the morning in the driveway at the 2500 side of Rosemead Boulevard. Loren Peaslee was also present. Solis threatened to kill Tom Simovich. Peaslee corroborated this testimony stating that almost daily he walked with Tom Simovich and around Christmas of 1979, just prior to the Christmas holidays, he heard a conversation in the driveway where Joe Solis stated he wanted to talk to Tom Simovich. Tom Simovich and Joe Solis engaged in a conversation for a minute or two while Peaslee remained about 6 feet distant. According to Peaslee, he could only hear partially what was being stated in the conversation but at one point Solis stated in a voice louder than that used during the rest of the conversation, "I will kill you." Tom Simovich then turned around, walked toward

Peaslee and walked into Peaslee's office. Peaslee stated that at that juncture, Tom Simovich was quite pale.

The second threat, according to Tom Simovich, occurred in the afternoon in the presence of his son, Ed. During the day of October 23, individuals were coming in for job interviews. In response to such activities, Solis stated, "I'm going to kill you for hiring these other people to take our jobs." According to Ed Simovich, he observed Joe Solis at approximately 4 p.m., around quitting time, on October 23 standing at the gate at 2439 Rosemead which is in front of the main office. Although other pickets were present, only Joe Solis was in close proximity to Tom and Ed Simovich. Ed and Tom Simovich were preparing to open the gate in preparation for the employees' departure. According to Ed, as Tom opened the gate, Solis and another individual they had never

seen before and who has not been identified herein, came up and told Tom that if he hired any more people to replace him that he was going to kill Tom Simovich.

As Tom Simovich was leaving the plant that day after 5 p.m., being the last person out of the plant, he passed by Carlos Almaroz who had a rock in his hand. Tom Simovich was proceeding very slowly out the gate and when he was proceeding down the driveway preparatory to entering Rosemead Boulevard, the pickets started getting close to his vehicle and calling him all kinds of names. When Carlos Almaroz got within 10 feet of the car, he threw the rock which struck the station wagon on the top, bounced off the roof rack, and went over to the oncoming traffic. Tom stated he then stopped momentarily to see if anything else was being thrown at him. He then proceeded to a phone booth and called the Sheriff's Department

reporting the incidents that transpired that day. The following morning he made a full report of the incidents. A guard observed the rock-throwing incident. Solis was not arrested for the alleged threats and no charges were filed against him for these alleged threats. Solis denies making these threats. Almaroz was charged with a violation of the Criminal Code for throwing the rock at Tom Simovich's car and, according to Carlos Almaroz, he was also charged because Nick Ianello claimed that he threw rocks at Ianello's car on the same day. Almaroz denies throwing the rocks at both Ianello's and Tom Simovich's vehicles and the charges were dropped based on improper identification.

When Tom Simovich arrived home the evening of October 23, he immediately telephoned his son, Ed, to relate the particulars of what transpired after Ed

Simovich left the plant. Tom Simovich opined that the violence was increasing rather than subsiding. According to Tom Simovich, prior to October 23 he had attempted to get Ralph Gazzigli to stop the violence, but to no avail. He felt that his meetings with both the Sheriff's Department and Gazzigli resulted in no cooperation and also opined that Mary Garcia did everything she could to raise the tempo of the violence and nothing to quell it.[48] Tom Simovich informed Ed

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[48] It is noted that Tom Simovich is the only individual who indicated that Mary Garcia did anything to encourage violence or improper behavior on the part of the picketers even though there were a number of individuals, including Ed Simovich, assigned to observe the picketers, particularly during the commencement of work when the employees entered the plant and during the employees' departure from the plant at the end of the work day. It is further noted that no specific conduct on the part of Mary Garcia was described by Tom Simovich and therefore this allegation is found to have no probative value as to Mary Garcia's activities or as to Gazzigli's activities during the strike.

Simovich that he decided to close the plant down for several days. Tom Simovich believes the plant was closed for 3 or 4 days and the employees were paid for those days, as authorized by Tom Simovich. He authorized the payment of all employees during the closure because he felt that the violence was indicative of the situation being out of control and he desired a cooling off period to avoid bloodshed. He was aware of the fact that Pedro Lopez had been stabbed; he knew that a great deal of destruction had occurred; the women working at the office were getting phone calls which frightened them; he stated the wives of employees were panic-stricken because their husbands were threatened and the wives' lives were

threatened; therefore, he desired a cooling off period.[49]

Tom Simovich, in addition to calling the Sheriff's Department with regard to the violence, called the District

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[49] The damage detailed by Tom Simovich leading to his decision to close the plant after October 23 for several days included tires being slashed; rotten eggs being thrown; nails being placed in front of the plant; damage to the homes and private vehicles of office and other personnel; damage to vehicles and property owned by Respondent; the activities of the picketers preventing ingress and egress by standing in front of vehicles and shouting at the drivers and other occupants; threatening one food truck driver that if he sold food on the plant's property his truck would experience some flat tires and would be smashed, and other food trucks were not allowed to enter the property; some of the employees who were continuing working during the strike wanted to challenge the strikers because of the bad language being shouted by the strikers; the contamination of the gasoline tanks; an individual being struck by a bottle; a confrontation with Gazzigli which he felt that Gazzigli did not have any control over his people; and his feeling that the duly constituted authorities were either uninterested or unable to give sufficient protection to permit continued operation of the plant.

Attorney, the Attorney General's office, senators and congressmen explaining that the violence had occurred at his plant. According to Tom Simovich, every branch of the government except the Sheriff's Department "poo-poohed the whole thing," they instructed him to sign the contract. Tom Simovich then testified, "Now, I'm the last word, here. And here I am, going to assume a responsibility of having something I've worked for for 30 years, plus the time 10 years prior to that building the plant that I've got, and having people killed, which I couldn't replace anything of, and the extreme violence that was going on here." He stated he could not converse with Gazzigli who didn't give a "damn, except wanting to destroy you. There's no point in carrying on a conversation with the man." When asked what he meant by destroy, Tom Simovich stated:

You--well, I'll tell you right now. Anybody that--now, I've been schooled with Lockheed Aircraft, and I know what rights, basically, I have--which is very little--and I know what rights the union has. Okay? I know that I can't tell a man he's fired. I don't--I have no right to fire a man without due cause or due warning. I know that when I fire a man, that I must give him a written notice. I must give him his check within the day and I must give him any benefit that he's got coming. . . . Now, in my particular case, I'm running this plant. I'm not looking for any trouble. And I don't want any trouble. I've run this plant for 30 years. I've never had any trouble before.

I've never had anybody destroy my plant. I've never had any employee to spit on a vehicle. I've never had an

employee challenge another employee in my plant. I've never had an employee challenge my people at their homes and destroy their equipment and threaten their lives.

I've had a harmonious plant. We know one thing and if you don't know it now, you never will: The object of the union is to get a closed shop and dues paid. If they don't get that that's what they're after. If they don't get that, the only [thing] left is destroy to submission--'til you submit. That's a rule of thumb. And I know that.

And as far as I am concerned, I am trying to get along with people. I don't care whether all my people belong to the union. That's their prerogative. I have no concern if they go to church on Sunday or if they don't go to church on Sunday, what they conduct themselves

and their family or how their children conduct themselves at school.

I'm only interested in one thing. That's harmony. And if my people want to join the union and pay dues, that's their prerogative.

If a man wants to walk a picket line all day long, that's his prerogative. I know that. For me to tell a man that he can't walk a picket line is stupid. For me to tell a man he's fired because he walks a picket line, that's stupid. You know that. It's foolish to even ask me that question. . .

And I've been subject to something that anybody in his common sense would never have been subjected to, trying to run a business as a law-abiding businessman. I have got hell. And I am telling you, I know.

Let me tell you this: I know that when a man threatens me and has created violence in my plant and threatened other employees to vote for a union--and have come to me and told me this--and I've checked on his record, and I see that he has a record of what Mr. Solis has, that I'm concerned.

When a man tells me he is going to kill me, that has had at least seven or eight charges--whether he is taken or not, and you and I know the judicial system in our country stinks--now, when a man has those charges that I know about and he threatens my life, I'm concerned. You're damn well I'm concerned.

When Tom Simovich determined to close the plant for 3 days in October, he did not notify the Union. He stated he did not think it was any of their business. Tom

Simovich also closed the plant down again in November 1979 for 4 days during the Thanksgiving holiday period, which was contrary to normal practice, and did pay the employees for an extra holiday that was not previously accorded them. He does not think he notified the Union that the plant was going to be closed in November. He stated he did not think it was any of their business.

Also during the Christmas and New Year period the plant was closed down for 3 or 4 days and the employees were paid for a holiday not previously accorded them. He did not notify the Union of the shutdown or that the employees were going to be paid for those days because "they didn't cooperate with me." When asked what the lack of cooperation constituted, it was defined as the Union's failure to control the violence and Gazzigli stating he didn't condone it and walking away, indicating to Tom Simovich that he did

not "give a damn" and just wanted to destroy the Company, as previously discussed.

Ed Simovich confirmed his father's testimony that the plant was closed for 3 days in October as well as the Friday after Thanksgiving in November and the 25th of December, which were not normal holidays and that the nonstriking employees were paid for those holidays. Ed Simovich also confirmed that the Union was not notified of the Company closings on those dates.

On November 19, 1979, a notice to all nonstriking employees signed by Tom Simovich announced that in addition to the Thanksgiving holiday, November 22, the plant would be closed Friday and Saturday, November 23 and 24, for mangement's convenience and that the employees would be paid the 8 hours for Friday, November 23. The notice also stated:

The existing labor dispute is now entering its sixth week. At this time, the management would like to express its thanks to the employees who have continued to work through this difficult period, for their loyalty and support. The management of Champ is well aware of the inconveniences that you have endured during the strike, and is most appreciative. We are committed to doing all possible to ensure the welfare of our loyal employees. Only through your continued diligence and perseverance will we overcome this obstacle, and all prosper.

The notice concluded that all the employees could use a rest from the pressures of the strike, indicated a need for improved production and expressed the hope that the rest afforded by the additional days off would permit the employees to return with a

"new vigor." On December 17, 1979, a similar letter or notice was distributed to all employees by Tom Simovich announcing that in addition to the plant being closed on December 25 that they will also have a plant shutdown on December 24, "for the sake of management's convenience." The announcement stated that the employees would be paid a straight 8 hours' wages for both Monday, December 24, and Tuesday, December 25. Ed Simovich explained his father's wording that "convenience of management" meant that the supervisors were extremely tired from the stresses of the strike, and it was determined that they needed effective supervision to avoid safety problems. Therefore, they decided to give their employees an additional rest those holidays. Ed Simovich also recalls on October 23 receiving a phone call from one of the guard services stating that there was going to be a gang war at the

plant. There was a police meeting about it sometime during the early phases of the strike. Finally, Tom Simovich confirmed that when his father called him on October 23 he stated he was in fear for his life, that he wanted Ed Simovich to call various people to notify the employees that they were not going to be open for the next several days and that he also checked on some places where they could purchase bullet-proof vests and that they wanted the managers to wear such vests. It was for these reasons that Tom Simovich stated to his son that he was going to shut the plant down to permit a cooling off period. It is uncontroverted that these additional holidays were not heretofore granted to the employees and it was clearly admitted that the Union was not informed of the granting of these additional paid holidays.

The Company further admitted that ordinarily there were 6 paid holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving and Christmas.

Other Incidents Relating to the Decision to Add the Number of Days of Paid Vacation for the Employees Who Did Not Go Out on Strike

According to Gazzigli, during the December 12 negotiation session at the Saddleback Inn, Ed Hoy, in addition to discussing vandalism and property damage, inquired if the union would accept an additional holiday on December 24. Gazzigli stated in reply that he was not going to put the union in a position of piecemealing the economic proposals. The Union wanted to look at the entire economic package and would not agree to a proposal of only one item related thereto. Hoy then inquired if Gazzigli was rejecting it, to which Gazzigli replied yes,

he could consider it rejected. According to Gazzigli, Hoy also mentioned during this meeting that the Company had reinstated or rehired enough employees, 110, that they did not feel they needed to take any strikers back to work.[50]

Gazzigli noticed that the plant was closed an additional day for Thanksgiving and knew that the day after Thanksgiving was not a normal paid holiday. He also noted that the employees subsequently got additional days after Christmas and New Years. The Company did not notify the Union of these additional holidays. During the December 12 meeting, he did not know that the holidays

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[50] As will be stated hereinafter, Frank Zamora and Ricky Craft testified that this statement by Hoy regarding the 110 current employees was made by Hoy during a negotiating session on January 8. This discrepancy in testimony is found insufficient to affect credibility.

were paid for by the Company and were additional vacation days.

Gazzigli asserted that during a membership meeting of December 31, his view of the Company's actions changed when Mickey Lambright, whose father still worked for the Respondent, was informed by his father that the employees were paid for the added day given the non-striking employees the day after Thanksgiving. Mickey Lambright obtained his father's check stub. At the meeting they also discussed the fact that the plant had been closed for an additional day around Christmas. Gazzigli informed the members at the December 31 Union meeting that he considered it an unfair labor practice for the Company to unilaterally grant additional holidays during the course of negotiations without negotiating the change with the Union, the certified bargaining agent. After explaining the position of the Union that

additional holidays were considered unfair labor practice issues, Gazzigli requested the membership to vote on whether they wanted to make that unfair labor practice question one of the strike issues. The membership passed the motion making as a part of the strike issues the fact that the Company effectuated unilateral changes in working conditions by granting additional holidays with pay without prior negotiations with the Union. The vote was again taken by a call of hands.

Gazzigli also stated that during the January 23 negotiating session, the granting of additional holidays was specifically discussed. Gazzigli assertedly asked Hoy if the additional days after Thanksgiving and during the Christmas-New Year period were granted as paid vacations. Hoy was averred to have said no, that they

were not, that the plant was closed those days for production reasons only.[51]

Baugh corroborated Gazzigli's testimony regarding the December 2 negotiating session, stating that the Company had offered another holiday, the day after Christmas, as an additional holiday. He stated Gazzigli replied that it could not be accepted without the entire economic proposal which they had not yet received, so Hoy replied that he was going to tell his people that the Union had rejected the offer and

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[51] It was also during the January 8 or 23 meetings that Ed Simovich's car had some effluent poured upon it that ruined the paint on the car. Gazzigli stated that he felt rather badly about it, expressed sympathy and asked if he could be of assistance to give Ed a ride or something, to which Ed Simovich replied no, that he was going to a gas station to have the car fixed or towed. Hoy testified that it was during the December 12 meeting that Ed Simovich's car had a corrosive effluent poured upon it. The discrepancies in dates are deemed insufficient to affect credibility resolutions.

then Hoy left the room.[52] Baugh also said that subsequent to December 12 there were discussions about additional holidays, but he could not recall the exact dates. He opined that the discussions would have occurred after Christmas. Inasmuch as Hoy admitted that during the December 12 negotiating session he asked if there were any objections to making December 24 a paid recognized holiday, to which Gazzigli objected, the testimony of Gazzigli is credited. It is hereby found that the question of the creation of additional paid holidays without negotiating with the Union became a strike issue pursuant to the vote of the members on

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[52] Also, according to Baugh, during the same meeting which was attended by Gazzigli, Zamara, Manny Avalos and himself for the Union and Hoy and Ed Simovich for the Company, they discussed property damage, that the Company ascribed culpability for the damage to the Union and the Union disagreed with the ascription.

December 31, 1979. Other matters also discussed during the December meeting included the ongoing discussion about violence, seniority for bargaining unit people, dues checkoff and management rights. Very few economic issues were discussed. They had not reached that point in the negotiations, according to Hoy, even though the Company did raise the issue of additional holidays. Hoy did not testify specifically with regard to the January negotiating sessions.

9. The Events of October 25 and Related Events of October 31 and November 5, 1979

According to Ralph Gazzigli, on or about October 25, 1979, he received a telephone call from Hoy requesting that just the two of them meet and attempt to identify the major problems preventing them from consummating a contract. The meeting was

conducted at Hobo Joe's Restaurant, which is approximately a mile away from Respondent's plant. It was held at approximately 4:30 p.m. According to Gazzigli: "Well, I asked him what the--what the reason for the meeting was. He [Hoy] said that the employer had given him a list of five people, and that--he stated very adamantly that these five people were--would never be rehired, or reinstated under any conditions, circumstances, by Champ Corporation." Hoy specifically stated that the list contained the names of people management--specifically Tom Simovich--stated would not be rehired. The five names listed were Steve Baugh, Roberto Valenzuela, Joe Solis, Ruben Gutierrez and Eduardo Ortiz.[53]

Gazzigli inquired of Hoy exactly why these five people were being singled out,

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[53] It is noted that Gazzigli referred to Roberto Valenzuela, but Valenzuela's first name is Heriberto.

and Hoy responded that they were characterized as troublemakers, that Steve Baugh was extremely vocal and loud, making a lot of noise, screaming and yelling, that they were all considered troublemakers and that they might have been the perpetrators of the vandalism or property damage experienced by the Company and some of its employees. Gazzigli requested specific statements of wrongdoing and whether there were any arrests or formal charges against them. Hoy said no but, as far as Tom Simovich was concerned, the listed individuals were troublemakers, they had merely been dubbed troublemakers or agitators and that Hoy had been instructed that they would not be hired or returned to work under any circumstances.

Gazzigli claims that he responded that there was no way that he could negotiate or agree to single out any person or persons as subject to having their jobs negotiated

away by the Union representative. He also stated that problems such as vandalism or property damage could be handled by the police and pursued through the courts, not on the basis of negotiations. He told Hoy that he should tell his employer--meaning Tom Simovich-- that he could not negotiate on the basis of certain people not being reinstated.

Gazzigli did visit the picket line prior to the meeting of October 25 and he heard the pickets addressing obscenities to individuals passing through the picket line. Most of the obscenities were in Spanish, some of which he knew but he does not speak Spanish well. He also saw pickets engaging in obscene gestures some of which he did not understand. He also noted on two occasions that he heard thumping sounds as cars would pass through the picket line and saw on several occasions Ed Simovich and some guards sweeping nails out of the driveway before

cars would leave in the afternoon. He believes the Company swept the driveways every day. During the meeting of October 25 at Hobo Joe's, he recalled Hoy making a statement that the Company had suffered $80,000 in property damage, mentioning truck tires being flattened, a bomb being exploded on Company property which damaged a door. Also, someone had their foot broken but the circumstances surrounding this injury were not described. He does not recall if the Company was closed for several days.

Edmund Hoy remembered the meeting in a slightly different light than Gazzigli. Hoy admitted it was his idea to have the meeting to discuss the problems that were keeping the Company and the Union apart. Hoy identified the Company's chief concern as the inclusion of management rights language in the agreement and characterized the Union's major concern as a dues check-off provision.

Gazzigli was also assertedly very concerned about a union security clause. Hoy also claimed that he and Gazzigli discussed the violence that was occurring since the commencement of the strike. There was mention that the executives and some supervisors were wearing bulletproof vests. According to Hoy, Gazzigli acknowledged that the extent of the violence was unfortunate and that he would do everything he could to have his people realize that the violence was not going to assist them in accomplishing their goal, but stated that there were some people he could not communicate with or control and mentioned by name Steve Baugh and Joe Solis.

Hoy admitted discussing with Gazzigli the fact that the Company had concerns regarding particular employees who participated in the strike who were trying to thwart ingress and egress of vehicles,

pounding their fists on cars, scaring female secretarial staff members, using abusive language, and mentioned by name Baugh, Solis, Ortiz and Gutierrez. He could not recall some of the other names but he stated that he was given a list of individuals by Tom Simovich on a small piece of paper and that the list included about six names, but all he could remember were Baugh, Solis, Ortiz and Gutierrez. The list was given to him on the premises of the Company prior to the meeting at Hobo Joe's and the list was handwritten. Tom Simovich gave him the list but he had no idea where Tom got the list before it was handed to him. When Tom Simovich handed him the list, according to Hoy, Tom stated it was a list of the names of people who were causing many problems on the picket line and that he would like Hoy to consider that these individuals were part of the negotiations for the strikers to return to work on two

grounds: one, to see if Ralph Gazzigli could have these people act in a non-violent and non-threatening manner; and, two, if there was to be a contract concluded at this time, he would prefer that these people not come back to the Company. There was then a discussion of how the strikers would be reinstated; those replaced would be placed on a preferential hiring list, and those strikers whose jobs were not filled by replacements could return to work upon ratification of the new contract.

Tom Simovich also stated to Hoy that the people on the list had behaved in a violent manner to him and others and that was the explanation for their inclusion on the list but that he could not recall with specificity due to the passage of time what the allegations were involving those individuals. Hoy subsequently modified his testimony, saying he could not recall whether

Tom Simovich, at the time he gave Hoy the list, stated with specificity why particular individuals were included on the list. He also could not recall any mention of the individuals on the list being arrested.

Hoy also stated that he showed the list to Gazzigli but he could not remember the specifics of the discussion as to each individual or the mentioning of particular acts of violence such as pounding on vehicles or the use of profanity. He did recall Gazzigli inquiring if Hoy's statement was the position of Tom Simovich or the Company, and was told it was the position of the Company and that Tom Simovich was the general manager. Hoy could not recollect if Gazzigli stated he wanted all the strikers reinstated upon consummation of the contract, but Hoy considered the Company's position on the manner of reinstatement a typical subject of

negotiation in those cases where there have been strikes with attendant violence.[54]

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[54] Hoy later testified that he had the list in his hands during the meeting but does not recall showing the list to Gazzigli. He later stated that he did not know who actually wrote the list; that it did contain five or six names, but he had no idea why the names were on the list. He did again assert that Tom Simovich gave him the list but did not say why the names were on the list. This is somewhat different than his prior testimony that Tom Simovich stated that these individuals were violent and the Company would like to have an agreement that they would not be reinstated. The prior testimony was more responsive directly to the questions and, based on demeanor, candor and inherent probability, the earlier testimony is credited. A further basis for not crediting the modifications in testimony is the affidavit of Hoy which was dated March 18, 1980 and stated:

> The two of us were alone. Gazzigli told me that once a contract was consummated, he said that he would want the striking employees to be reinstated to their former jobs. I told him that I would have a problem with those employees that had been on strike, that had criminal charges against them at this time for causing damage to employee and company property and for carrying concealed weapons. Gazzigli said that he understood

(continued...)

Tom Simovich[55] admitted that early in the strike he mentioned a few names of particular strikers to Ed Hoy that he thought

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[54](...continued)
this. I told Gazzigli that those employees with criminal charges I had a problem with, that we would have to talk reinstatement when they did not have criminal charges pending. It was understood that if the criminal charges were cleared up against the employees, there would be no problem with reinstating the employees. If the company and union reached an agreement on reinstating the strikers. I said that I had a list of the strikers that had charges against them that had been obtained from the sheriff's department.

Hoy stated that his affidavit was not accurate as a rendition of the facts but that it was an accurate rendition of the affidavit. He denies stating to Gazzigli during the meeting that these employees had criminal charges against them. It is noted that Hoy's statement in his affidavit is more closely aligned to Respondent's actions that his testimony, further discrediting his testimony.

[55] The testimony of Tom Simovich is presented sequentially, as given at trial, to assist in making credibility resolutions.

Hoy should know about. The names were mentioned because Tom Simovich felt the people, particularly Gutierrez, Solis and Baugh, as well as approximately three others he could not recall, continuously created a great deal of violence and were responsible for maintaining the "tempo" of the strike. On cross-examination, his mind was a blank about the conversation he had with Hoy about certain violent strikers including Gutierrez, Solis and Baugh. He then stated the conversation occurred near the end of the strike, that there were actually two conversations at the end of the strike, one telephonic and the other on a direct, person-to-person basis. In this later conversation, Tom Simovich claimed he told Hoy that he was concerned about a number of people who, in his opinion, were very violent, including Baugh, Solis, Gutierrez, Ortiz and at least two others, because, if they were brought

back to the plant, there might be an uprising. He would rather bring back what he considered good people. He stated the only way he could make a profit was for him to maintain harmony among his employees and that reinstating the agitators could create confrontations which he did not want, "because he must pay through Social Security benefits and he did not want to see anyone getting hurt." Tom Simovich denied telling Hoy that he did not want the people back at the plant, stating that he knew that he did not have that right, but merely gave Hoy the information. A couple of days later, they had a face-to-face discussion at the office wherein he told Hoy that he considered the listed individuals or the named individuals violent and was concerned with their return to the plant because they could cause an uprising and that he wanted the "UAW or the National Labor Relations Board responsible

for any uprising since they were requesting that he bring those people back. . . he did not want the responsibility for the confrontation." Tom Simovich then flatly denied giving Hoy a list of names. Considering the demeanor, the inherent inconsistencies in Tom Simovich's testimony, the admission against interest of Hoy that such a list was in fact given to him and he did discuss it with Gazzigli, and Gazzigli's testimony lead me to conclude that on October 25 such a list was presented to Gazzigli and the individuals named thereon were considered as potentially unreinstatable employees and that, further, the named employees being deemed unreinstatable were being, in fact, terminated by the Company.

Approximately a week after the October 25 meeting, on or about October 31, 1979, there was a negotiating session at a location designated as T.J.'s Restaurant.

Present for the Union were Gazzigli, Frank Zamora, Steve Baugh and John Gresko. Present for the Company were Ed Simovich and Edmund Hoy. Also present was Commissioner O'Sullivan from the Federal Mediation Board. According to Gazzigli, Hoy announced that the Employer's position had changed in that as far as the Company was concerned, the questions of economics and contract language were secondary to the issues derivative from the strike such as property damage and vandalism; and that they did not want to continue negotiating in the current atmosphere of violence. Gazzigli claims he responded that the UAW had taken many steps to instruct the strikers that vandalism, property damage or similar activities would do nothing to enhance their negotiating position and would in fact be very detrimental to their chances of obtaining a contract. It is noted that Hoy admitted that

Gazzigli indicated that he would get an individual to assist him with the Spanish-speaking strikers and that, from that meeting on, Mary Garcia was frequently present on the picket line as well as Gazzigli. Mary Garcia is fluent in Spanish. Gazzigli explained to the Company negotiating team that the Union had gone to great lengths to talk to the strikers at meetings prior to the strike to make them aware of the fact that if they did create problems such as vandalism, property damage or physical intimidation, they would be subject to arrest and would be on their own without the backing of the Union. At that point, according to Gazzigli, Hoy again wanted to present the list of names that had been discussed at the October 25 meeting, which Gazzigli characterized as listing individuals the Company would not take back under any circumstances. Gazzigli asserts that Hoy said that whether they came to an

agreement or not or whether the strike ended or not, the Company would not take the listed individuals back. Hoy wanted to present the list to him across the table, but Gazzigli cautioned Hoy that he felt such an act would change the entire mood of negotiations. Gazzigli also asserts he told Hoy that the Union negotiating committee would not and could not negotiate away an individual's job. Gazzigli then suggested that Hoy keep the list and if the individuals named thereon had been the genesis of problems, the Company should go to the authorities, report the problems and have the duly constituted authorities resolve the difficulties through the courts.

At that juncture, the Commissioner had the two parties separate for caucuses, talking individually to the parties. During the Commissioner's talk with the Union, he indicated that the Company was still adamant

about the cessation of violence. Gazzigli indicated, he claims, to the Commissioner that he understood the Company's position but that with regard to the list he felt it was "a very bad move" to put the list on the table, that the list he had seen contained the name of one of the Union bargaining committee members and that if the list was placed on the table it would totally disrupt the mood of the negotiations. According to Gazzigli, the list was never formally presented or passed across the table.

Baugh corroborates Gazzigli's testimony, stating that Hoy said he had a list of people who would under no circumstances work for Champ Corporation again and he wanted to present the list to Gazzigli but Gazzigli refused. Gazzigli, according to Baugh, stated that he was negotiating for all employees. At that time, Hoy assertedly withdrew the list or said he

was not going to present it at that time but laid it down on the table and Baugh noticed several names, Joe Solis, himself and Lorenzo Franco. There were others but he could not recall them at the time of his testimony.[56] Hoy stated that the October 31 negotiating session did contain extensive discussions on the increasing violence but could not recall anything other than certain areas of violence and specific individuals that the Company felt were causing problems being discussed at that session. Hoy's failure to remember other specific details is insufficient to refute the allegations of Gazzigli and Baugh which, cojoined with the prior credibility

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[56] Francisco Zamora testified that he could not recall any list being mentioned at the meeting. However, Zamora's inability to recall many of the details of the meeting, plus the fact that he was not named on the list renders his lack of corroboration inadequate to refute the testimony of Gazzigli and Baugh.

findings, require the conclusion that the list of names was a matter discussed during the October 31 negotiating session and that Baugh saw the list.

On November 5, the Union conducted a membership meeting at about 11 a.m. at the Carpenters Hall in El Monte, California, which was held in order to pay strike benefits. Present for the bargaining committee, in addition to Gazzigli and Mary Garcia, were Frank Zamora, Steve Baugh and John Gresko. Approximately 50 to 55 strikers were also present. According to Gazzigli, the purpose of the meeting was to report on the negotiations and it was their practice to have weekly meetings to inform the strikers of the negotiations to date and to determine which problems were transpiring, while at the same time paying the strikers their strike benefits. Also, according to Gazzigli, the strikers raised several questions during the

meeting. Some strikers heard or were told that they were fired or had to leave the picket line or that they might just as well leave the picket line because they would not be reinstated, that they were never going to work at Champ again. Also raised during the meeting was the fact that the Company had presented the negotiating committee with a list.

Steve Baugh said he saw the list and noted that his name was on the list which the Company wanted to present at the negotiating session held on October 31. Baugh also mentioned that he had been told by Tom Simovich that he was fired along with Jose (Pinky) Naranjo and that Tom Simovich also told him he might as well go home, that they were fired and they were not going to go back to work for him. Joe Solis and Eduardo Ortiz also related that they were told that they might as well go home, that their

picketing was futile and they would never again work for Champ Corporation. Gazzigli informed the members that he had taken a position during the negotiations that he was negotiating for everybody and they would not agree to single out individuals as not being returnable to work. A motion was made from the floor that the membership support that position. According to Gazzigli, a vote was taken and passed unanimously. The ballot was by formal showing of hands, not a written ballot. In addition to Gazzigli, whose rendition is credited based on demeanor and clarity of recollection, Ricky Lynn Craft, Francisco Zamora, and Steve Baugh also testified similarly as to what occurred during the November 5 meeting. Craft and Baugh specifically corroborated Gazzigli's rendition of the meeting, stating that there was a vote by a show of hands addressed to the issue of whether everybody withheld their

services until all were returned to work. Zamora also stated that at the November 5 meeting it was discussed "that the Company would not accept several strikers back under any condition."

It is noted that Respondent objected to Gazzigli's testimony as to the November 5 meeting because it was hearsay and it was not accepted for the truth of the matter asserted. However, there was no such objection to the testimony of Steve Baugh which also contained the facts asserted by Gazzigli. Accordingly, credibility resolutions will not be altered due to the objection.

According to Zamora, at a January 8 negotiating session Hoy mentioned the strike and the violence attendant thereto and stated that under no circumstances could several strikers ever be returned back to work, that the Company had 110 employees that

they wanted to keep and unless there was a big layoff he couldn't see taking some of the strikers back. According to Zamora, also present during that January 8 negotiating session at the Saddleback Inn were Gazzigli, Baugh, John Gresko, Ricky Craft and himself. Present for the Company were Hoy and Ed Simovich. Zamora could not recall if any of the strikers' names were mentioned. Gazzigli asserts the Company stated its position that the Employer had replaced the strikers and they really didn't need a contract, that they didn't need the strikers back, that they were operating without them and that some had been permanently replaced or that all had been permanently replaced. There were no strikers specifically mentioned during the meeting.

Ricky Craft attended the January 8 negotiating meeting and confirms Zamora's version that the Company stated they had 110 employees, that there were no job openings at

that time and that they were not going to take anyone back. After the meeting, Craft asserts, without contradiction, he went back to the picket line to tell the strikers what had occurred at the meeting. Craft did not testify as to the reaction of those employees.

10. The Events of October 29, 1979

On October 29, 1979, Carlos Almaroz was charged with throwing a rock at Nick Ianello's vehicle. This allegation has been discussed previously. Almaroz did not recall that he allegedly threw the rock on October 29 at Nick Ianello's vehicle; rather, it is asserted that he was accused of throwing the rock on the same day he was accused of throwing the rock at Tom Simovich's car which was October 23. Larry Larson, as well as the official charges filed against him, assert that the rock was thrown on October 29. The disparity in dates is not outcome

determinative. As previously indicated, Larson stated he saw Carlos Almaroz throw a rock that hit the passenger door of Nick Ianello's car as the car was leaving the Company premises in the afternoon of October 29 at approximately 4:30 p.m. Larson claims he told Ed Simovich and Arvilla Shooter about the incident the following morning and had a conversation with Nick Ianello who said he was going to file charges. Larson did appear in court on the matter pursuant to a subpoena and the charges were dismissed for inadequate identification.

11. The Events of October 30, 1979

On October 30, 1979, Champ Corporation, under the signature of Tom Simovich, mailed a letter with a Spanish translation to the homes of all employees that were either on strike or on a leave of absence or in some other manner not at work on that date. The letter states as follows:

We have been waiting patiently for you to return to your job and we shall continue to do so until Friday morning, November 2, at 8 a.m.

If you choose to keep your job, drive in the gate where the guards are just south of the company's main office and go to the personnel office-you will be put to work immediately.

<u>There is plenty of work and Champ will continue to operate!</u>

If you choose not to return to your job, you may <u>Lose Your Job Entirely!</u> The company is not continuing the health and life insurance of persons not working-if you want to keep your health and life insurance protection for you and your family, you may do so by

calling (213) 444-9561 for instructions.

We do hope that you will give very careful consideration to this opportunity and to your future, and return to work now!

12. The Events of November 2, 1979

Manuel Oscar Avalos testified that on November 2 Tom Simovich walked over to him and Ernesto Franco[57] while they were picketing.

He [Tom Simovich] asked me [Avalos] when are we coming back to work; if we decide to go back to work, we can do anytime we want, me and Ernie and Tony Andrade and his

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[57] Manuel Avalos testified in English. Ernesto Franco needed the assistance of a translator although he exhibited a fair grasp of English by responding to some questions without translation. Therefore, the question of understanding is not in issue.

helper and some other guys. I cannot remember their names right now.

I tell him we cannot go inside because we are waiting to make a deal in the contract. The idea is everyone go back to work. The other way, nobody has got a plan to go back.

He say if we decide to go back to work without union, he can offer some benefits. That is what he [Tom Simovich] say.

At that time, Eddie Ortiz is walking in the street and he [Tom Simovich] say, "I like those guys. I say to go back to work, but this man [Eddie Ortiz] I don't like him to go back because he is a troublemaker.

Ernesto Franco testified similarly. He stated that Tom Simovich came up to him and Avalos while they were picketing on the sidewalk and said:

> He was going to choose the people who were coming back to work. He said he was not going to sign the contract because after the strike when the people came back to work there was going to be a[58] revolution and a massacre. . . . He said he had given us benefits before we brought the union in and now that the union was representing us he did not want to give us benefits. . . . He had 32 years with the company doing what he

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[58] It is noted that this statement is consistent with statements made by Tom Simovich in the portions quoted hereinbefore regarding the decision to close the plant in October, November, December and January.

wants and now the union would not tell him what to do, and he did not want anything to do with the union.[59] . . . He said he was going to choose the employees; only the good workers and not the troublemakers. . . . He told us we can go back to work, that we was good workers. He said he was not going to sign the contract between employees and strikers and employees who don't come out to the strike can be a revolution and a massacre.... At that time was driving up a striker, Fecundo.[60]

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[59] Again this is similar to previous statements made by Tom Simovich as related above.

[60] Fecundo was subsequently identified as Eduardo Ortiz.

He [Ed Simovich] point and he said he was a troublemaker.

Tom Simovich denied having any conversations with Manuel Avalos and stated that Ernesto Franco does not speak English. Based on the relaxed persuasive demeanor of Avalos and Franco, the corroborative nature of their testimony as compared to the unconvincing demeanor of Tom Simovich, the testimony of Avalos and Franco has been credited.

13. The Events of November 5, 1979

On November 5, 1979, Sheriff's Deputy Gary Edward Stead had occasion to go to Champ Corporation and file a complaint report in response to an allegation of vandalism, that Eduardo Ortiz struck Bob Peterson's van as it was entering Respondent's property.

Robert Peterson asserts that he was coming to work in his personal Dodge van

accompanied by his son, Keith Peterson, and two "Chinese fellows, Hen Lai," and an individual whose name he did not recall. He entered the driveway and, as he proceeded slowly through the driveway, his vehicle was struck at the left top portion near the passenger's side with a picket sign carried by Eduardo Ortiz. Peterson said there were two or three other pickets present but he did not recognize them. In his testimony, Peterson asserts that the incident occurred in an alleyway a couple of hundred feet south of Champ property. In an affidavit given by Peterson on May 27, 1980, which he signed and, to the best of his recollection, was correct, he stated that the incident where Ortis allegedly hit his van, which he believed occurred in January, happened at the entrance to 2500 North Rosemead. Other discrepancies between the testimony and the affidavit is that in the affidavit he claimed

there were six or seven pickets present whereas he testified that two or three other pickets were present. Another inconsistency is that he initially claimed that he reported the Ortiz incident to the Sheriff's Department but did not press charges because he considered the incident insignificant. Subsequently in his testimony, he stated that he did not call the police, they were already on the property. The police report stated that, contrary to his testimony, the victim [Peterson] "wanted to arrest the suspect for the offense but he was afraid of retaliation by the other pickets." Peterson testified that he had a poor memory. Ortiz asserts that the incident occurred because, as Peterson's vehicle entered the driveway at the main gate, it came very close to him. And as he jumped back, his sign moved forward and struck the van. Ortiz claims that the cardboard portion struck the van, not the

wood portion. Ortiz was not taken into custody because of this event. Based on demeanor, the numerous inconsistencies in Peterson's testimony as detailed above, and Peterson's admitted lack of clear recollection, his testimony is not credited.

14. The Events of November 9, 1979

On November 9, 1979, a blue and white Chevrolet, which was entering the plant at the 2500 North Rosemead gate struck Alberto Cortez. When it departed shortly thereafter, it struck Zamora on the left side. Neither individual was disabled because of the event.

Cortez says he was struck by a pickup truck in the main driveway at 2500 Rosemead at about 7:30 a.m. He estimates that the vehicle was going about 10 to 15 miles per hour, stopped and then hit the accelerator again. The driver was a individual known as "the eagle," later

identified as Victor Castonguay. Two guards were also present at the time the incident occurred. Ortiz was taken to the hospital by ambulance and apparently had only abrasions; the X-rays were negative. There was no indication that Castonguay was arrested or otherwise disciplined.

According to Castonguay, "Ortiz came up and hit my pickup and fell down. The guard just grabbed him and drug him out of the way." Castonguay claims Ortiz was standing off to the right of the vehicle when he stopped in the driveway pursuant to directions given by one of the guards standing at the gate. After the vehicle stopped, Ortiz allegedly came up and hit it and then fell down under it. He believes Ortiz hit the vehicle with his knee and faked an incident. Castonguay could not see what Ortiz bumped with his knee because he could not see in front of the vehicle and he does

not recall if Ortiz screamed as he fell. Castonguay just awaited the guard's dragging Ortiz out of the way. The guard then "motioned him through." One guard dragged Ortiz away while another gestured that Castonguay should proceed slowly through the line. Present, in addition to the guards, were sheriff's deputies but he could not clearly ascertain who was present with all the commotion. Subsequently in his testimony, Castonguay stated that the guard did motion the pickets to move out of the way of his vehicle, that the pickets then moved out of his way. Then he stated that the pickets did not move when they were told to clear a pathway for his vehicle. Castonguay again altered his testimony by saying that the guard just waited until there was an opening and then motioned him in through the line which was when they "jumped in front, then they would halt him again." Castonguay

did not exude candor in his testimony and the modifications and inconsistencies contained therein impair his credibility.

15. The Events of November 10, 1979

Early in the morning on November 10, 1979, Deputy Sheriff Daryl Goodwin was assigned by Sgt. McKeon during the morning briefing to watch the 2500 Rosemead location of Respondent because information had been received that there "were going to be problems that morning." McKeon directed Goodwin to go to that location, park directly across the street thereby possibly avoiding any problems that might arise. Goodwin was accompanied by Deputies Ballinger, Gloyd and Barden. They arrived at the assigned location at about 7:10 a.m. in two marked cars. The picketers across the street waved to them and Goodwin returned the greeting. In addition to these two cars, there was a car driven by Deputy Martin and a fourth

vehicle occupied by Sgt. McKeon. The cars were parked between 50 and 80 feet away from the picketers; the distance was not clearly stated by Goodwin. The vehicles were parked across the street from the picketers. Rosemead Boulevard has a center divider that contains small bushes as well as palm trees as high as 15 to 20 feet, but Goodwin states that the majority of the shrubbery is a foot to a foot and a half tall. He stayed in his car during the entire period of observation which lasted from 7:10 to 7:40 a.m. He observed Valenzuela on five separate occasions block the path of vehicles attempting to enter the driveway at 2500 Rosemead Boulevard. On one occasion, Valenzuela was seen to stand on the front bumper of a maroon Chrysler and bounce up and down on the bumper. On another occasion Valenzuela assertedly laid across the front hood of a passenger vehicle.

He observed four other individuals also obstructing entry onto the plant's premises. Accordingly, Goodwin decided at approximately 7:40 a.m. that he was going to arrest the five striking employees. The five individuals arrested were Heriberto Valenzuela, Ernesto Arroyo, Eduardo Ortiz, Ruben Gutierrez and Javier Olague. The charge noted on the arrest report as completed by Daryl Goodwin was obstruction of a thoroughfare, Section 647(c) of the Penal Code of the State of California. He does not know what has occurred regarding the disposition of the charges filed by him against these five individuals on November 10, 1979. Goodwin did not participate in any court proceeding to determine whether the persons were guilty of the alleged charges.

The five individuals arrested denied committing any wrongdoing, noting that the deputies were watching them and they did

in fact wave at the deputies. Valenzuela asserts that not only was he guiltless of any violation of law but that, immediately prior to his arrest, he was struck by a car and thought the police were coming in response to that incident and tried to explain to the policeman but was not permitted to speak. The car struck him on his left leg close to the knee with the bumper, but he did not receive any medical care because he was not permitted to speak to the police. After he was struck, he approached the police, he asserts, to give them a report of what occurred but was informed he was arrested and was not permitted to speak thereafter. Olague corroborates Valenzuela's testimony. Olague estimates that the police were approximately 300 yards distant at the time of their observation. Goodwin did admit that they were sufficiently distant and their view sufficiently obstructed that they could not

get any license numbers of the cars entering at the 2500 Rosemead Boulevard gate. Ortiz testified that he did not know why he was arrested but he thinks it was for "obstructing the street." Arroyo was also confused as to why he was arrested. He felt he was arrested all of a sudden, that they did not tell him or explain to him why he was being arrested but merely took him to the police station and locked him up. He still does not know why he was arrested but did go to court on December 3, 1980 and was told that he was free to go, that there was no charges against him, Olague, Ortiz, Gutierrez and Valenzuela. Arroyo asserts that he was not picketing at the time, that he was merely putting on his picket sign. Arroyo's testimony is not extremely credible because he stated he didn't do any picketing between 7 and 8:45 a.m., when he stated he was arrested. Inasmuch as that was the time that

the employees came to work, it does not appear logical that he would be standing by a lunch truck for an hour and 45 minutes. Accordingly, his testimony on this point is not credited.

Gutierrez also denied any wrongdoing when he was picketing on November 10 prior to being arrested. Gutierrez complained that frequently he was hit by a vehicle or an individual during picket duty tours. He stated he was hit on two or three occasions while picketing. The first occasion was while he was picketing during the nonstriking employees' departure in the afternoon. Someone was speaking to him in English and he turned to face the other direction when he was struck in the face with a hand or a fist. The fist struck him on the left side approximately between the cheekbone and the jaw. He does not know the

individual's name. He believes it is Scotto but knows the individual only by sight.

Gutierrez also asserts that the truckdriver, Gary, hit him in the hand with the truck and he pushed off the truck with his forearm. The third time he asserts he was hit was when he was walking in the same location as he was when he was struck by the truck driven by Gary and he was hit by a worker whose name he does not know but whom he described as being tall and thin. The worker wanted to depart the premises quickly and was in the station wagon which struck him on the right hip. The police made a report because they saw it. He was not so injured as to require medical treatment.

Shortly after the November incidents, according to Hoy, Company representatives and Union representatives met at the Temple City Sheriff's Substation. Present for the Company were Tom and Ed

Simovich as well as Hoy and possibly Art Van Haasen. Present for the Union were Ralph Gazzigli and Frank Zamora. Present for the sheriff's department, he believes, were Sgt. Williams, Terhorst and Capt. Butler. The police recounted the violence that had occurred up to that date and indicated they were having difficulty keeping the violence at a minimum and weighing the rights of the strikers. They did agree upon a new method of communicating with the Sheriff's Department which Hoy considered an improvement and they also worked out a means of monitoring the situation at the start and end of work. A marked police vehicle would try to be present at the start and end of each workday to mitigate violence, but there was no guarantee of continuing police protection. According to the testimony of Valenzuela with regard to the November 10 incident, Gazzigli had instructed the

strikers that they were to picket in an orderly manner and were not allowed to engage in any physical violence. None of the five employee strikers were found guilty and the charges were dismissed.

16. The Events of November 27, 1979

On November 27, 1979, Joe Solis assertedly threatened an applicant for employment with Respondent named Donald Coolbirth. According to Ed Simovich, both he and his father Tom were escorting Coolbirth to his van after an interview for employment. The van was parked in a company lot. The Company kept the gates locked during the work day, so Ed Simovich opened the gate to permit Coolbirth to leave the premises. After the gate was opened, he was directing Coolbirth out of the driveway. Tom Simovich was standing on the sidewalk to ascertain if any traffic was coming. According to Ed Simovich, as the van was about one-quarter to

one-half of the way outside the gate Solis approached the van and said to Coolbirth, "Hey, buddy, if you come to work, I'm going to blow you up with a bomb." Tom Simovich corroborated his son's testimony. Tom Simovich told his son that he was going to call the police or sheriff's department. Solis, according to Tom Simovich, did not touch the van in any manner nor did any of the other pickets.

According to Solis, he was picketing on November 27 in front of 2500 Rosemead along with 10 other strikers when, at about 4 p.m., Tom Simovich told the picketers to shut up and that if they did not get out of the way he was going to have the picketers arrested. The picketers then started hollering that they wanted a contract at which point Tom Simovich assertedly pointed toward Solis and said he was going to have Solis arrested within half an hour.

Solis claims he replied go ahead and call the cops, all I want is a contract.

Solis further asserts that approximately 10 minutes later, Sgt. Williams drove up, parked his car, sat there for about 10 minutes, waved at Solis and then left. Subsequently Solis then went to the Troy Street portion of the facility when an individual identified as Jose approached him to tell him that the police were looking for him to arrest him. Solis inquired what for, and Jose stated he did not know. Solis therefore went home and stated he called the police department from his residence and told them where he was if they wished to call him or talk to him. He was requested to call the police back in half an hour, which he did, and was informed he was not wanted. Solis then went to Colorado because his brother died. When he returned from Colorado, he was arrested on the evening of December 6. As

Solis understood it, the police stated that Tom Simovich claimed he had threatened somebody with a bomb. Solis informed the police that Tom Simovich was sick but the police said they had to take him in. After he was booked and remained in jail for a week, he was released. Solis was arrested for terrorism and was held in jail on $50,000 bail. Subsequently, according to Ed Simovich, the day before he was to appear in court he received a call from Deputy Rechschlaffen and was told that they could not locate Coolbirth. The charges were dropped against Solis. Solis denies making the threat. He did say that he told the replacement to respect the picket line, that they were on strike.

Solis composed some documents in the preparation of his testimony which were introduced by Respondent. The documents reflect that Solis' wife received bomb

threats which were reported to the police department.

Ed Simovich stated that also in November Solis told his father, Tom Simovich, "Tell your dad we don't want a contract anymore. All we want is for the company to go broke." Ed Simovich also noted that there was another incident in December, approximately the middle of the month, involving Solis. It is asserted that early in the morning Solis stood in the street next to the cab of a tractor-trailer that was present to pick up a forklift truck at Troy Street between the parts department and the service department. Ed Simovich claims he heard Solis say something to the effect, "that if he [the truckdriver] picked up the forklift he was going to bomb his cab, or truck." Ed Simovich does not recall who the supplier was. No charges were filed regarding this incident, and the failure to

file charges was unexplained. Another asserted incident involving Solis and Ed Simovich occurred in February or March of 1980 when Solis was standing near the gates of the parts department on Troy Street at approximately 5 p.m. Bruce Gary was also present. As Ed Simovich was closing the gate, Solis told him, "Don't bother locking the gate. It won't do you any good. We are going to tear the place apart."[61] Other reports made to Ed Simovich regarding Solis include an allegation by Victor Castonguay in the middle of March 1980 that Solis had tried to run him off the road with his truck. Roberto Corona reported to Ed Simovich that Joe Solis had tried to run him off the road on the San Bernardino Freeway and did pull

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[61] Ed Simovich also recalled the incident hereinbefore discussed wherein Loren Peaslee told Ed Simovich that Solis had threatened to kill Tom Simovich when Peaslee was present on or about October 23.

him over and threaten him. Corona also asserted that Jose Villavicencio was riding with Solis. There was no explanation as to why no complaint was filed regarding this incident.

Another allegation concerning Solis is contained in the testimony of Robert Peterson, currently mechanical foreman for Respondent, who saw a vehicle he identified as Solis' parked in a manner that it blocked access to an alleyway frequently used by Champ employees on their way to work. There was only one incident during the strike where the vehicle blocked the alleyway.

17. The Events of November 28 or 29, 1979

Ed Simovich avers that he saw Ramon Rodriguez engage in threatening conduct on two specific instances. The first occurred around November 28, 1979 at approximately 7:15 to 7:30 a.m. when the cars were entering

the main gate at 2500 Rosemead prior to commencing work. Rodriguez assertedly was picketing in front of the gate and slammed his fist down upon the hood of a car driven by an employee named John Hong. Ed Simovich claims that he could see a dent on the right side of the hood where the fist smashed thereon. Rodriguez also assertedly slapped the side of the car with his open hand.

Rodriguez admits hitting the car but stated it was not done on purpose but rather as an attempt to avoid being injured. He stated that the white Catalina automobile being driven by Hong hit him and, as he tried to regain his balance so he would not fall back, he struck the car. He testified that the car hit him on the side of his leg about calf-level. Rodriguez claims that he would not merely stand in the driveway because the employees would pass through the driveway at a very high rate of speed, at times not

waiting for the pickets to finish their walk across the driveway. He stated that in order to regain his balance he placed both hands upon the hood, palms down, which did make a noise as if he was striking it. He also stated he called the police but they would not come and later on he told the sergeant who took a report. The injury he received did not require him to go to the hospital. Apparently no arrests or convictions resulted from these incidents.

November 28 was also the date that Victor Castonguay's vehicle was damaged by a bomb and David Coronado assertedly spit in his face as he was coming to work. Castonguay was also the source of a report that Solis jumped up on his hood, pounded on his vehicle, but the date of the incident was not stated. Castonguay reported the incident to Ed Simovich because he was instructed to

notify the Company of any incidents.[62] Castonguay further claimed that Solis tried to run him off the road on Rosemead Boulevard, swerving into him. There was no contact. Castonguay was forced to pull all the way over to the right curb lane and stop. Also, according to Ed Simovich, he received a report from Ly Hen that some unidentified individuals yelled at him at a stop light and then threw a full can of fluid at him. Hen called the police, but there was no ascription to striking employees, and Hen did not testify.

Another event that allegedly occurred in November was that Arturo Nieblas said that Jose Villavicencio threw a rock at

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[62] This answer was given only after being pressed on cross-examination. He initially replied that he reported the incident to Ed Simovich because he did not want people pounding on his pickup. The witness appeared to lack a modicum of candor in his response.

his vehicle.[63] Villavicencio denies any culpability in the occurrences, stating he never threw any rocks, never saw anyone throw rocks, but admitted getting a letter from the Police which contained the allegation that he had thrown rocks at the vehicle. He denies ever throwing any rocks or seeing anyone throw any rocks during the strike.

It is noted that November 29, 1979 was the date the police were notified that the 40-foot shipping container had been destroyed by fire and about 50 percent of the contents, corrugated cardboard, were also destroyed by the fire. Also in November the car of Charles Lee Davis was damaged while

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[63] The Company claims that Villavicencio was in Solis' vehicle at the time Solis assertedly ran Roberto Corona off the San Bernardino Freeway and after causing Corona to stop on the side of the freeway, got out of their vehicle and threatened Corona. Villavicencio denies knowing an employee named Roberto Corona.

parked in the parking lot. Some rocks were laying beside the car and there were pock marks just below the window of his car. It was alleged by William Gustaf Koskela that sometime in November, while driving to work with Nick Ianello, Ruben Gutierrez threw a rock trying to hit the vehicle and the rock actually struck the vehicle. This matter has been discussed hereinbefore but certain events are included in this discussion of occurrences during November so that the events that assertedly occurred during the strike can be kept in perspective.

18. The Events of December 1 or 4, 1979

Eduardo Ortiz stated that the second time he was arrested was either the 1st or 4th of December when an individual he referred to as the "Cuchillo",[64] who was later identified as Roberto Corona, came out

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[64] Translated as "the knife."

of the plant and pointed to him. Tom Simovich and a policeman whom Ortiz regarded as a friend of Tom Simovich were present. They then handcuffed him. According to Sheriff's Deputy Terhorst, Ortiz was charged with kicking Roberto Corona's vehicle and thereby damaging it. Ortiz did not know why he was being arrested on December 1 or 4, but he was handcuffed, walked inside the Company property, taken to a car which was inside the Company property and then transported to the Temple City station where he remained for about 6 hours. Neither Corona nor Tom Simovich testified about the matter. According to Ortiz's unrefuted testimony, Roberto Corona was nicknamed "the knife" because he was hired as a replacement employee during the strike and always carried a stiletto or large knife which he occasionally showed the picketers by lifting

his jacket when passing through the picket line.

19. The Events of December 14, 1979

On or about December 14, 1979, Baugh, Ramon Rodriguez, Eduardo Ortiz and Lorenzo Franco were picketing at the 2424 Rosemead Boulevard location. Larry Larson came out with a forklift with which he was carrying a frame to be loaded on a truck parked on the street. According to Baugh, as they were walking along the sidewalk, Larson said, "Get out of my way or I'll run over you." The picketers kept walking at their normal pace, Baugh asserts, when Larson accelerated the forklift and stepped on the brake like he was attempting to hit them. Baugh asserts that the picketers jumped out of the way and Larson proceeded and placed the frame on the truck. Larson then allegedly returned to get another load, which was a forklift canopy and, as he was

again coming out the same gate, he droppd the canopy and two individuals were almost hit; these picketers were very upset and wanted to make a police report. The police department was contacted and they talked to an officer about the incident. The record does not contain any evidence regarding a complaint being filed or charges being brought against Larson. Therefore, it is concluded that no such actions were taken by any of the involved parties.

Larson asserts that the incident occurred on or about December 15, 1979, when he was attempting to load a Mitchell Brothers' carrier with a forklift rail and canopy. The Mitchell Brothers' driver parked on the street and there were pickets present at the time. Eduardo Ortiz and Jose Naranjo were the only two he could recall at the time of his testimony. The four or five pickets present at the time he proceeded to load the

rail yelled profanity at him. The picketers also attempted to obstruct his path in the driveway but he continued to move forward with his forklift and the pickets moved out of his way as he approached with the forklift. He stated that his maxiumum speed while driving the forklift was one to two miles an hour. Larson denied rapidly accelerating the forklift at the time he was driving through the picket line and he denied threatening to hit the pickets with the forklift. He did ask the pickets to move. He opined that forklifts are incapable of rapid acceleration. Larson informed both Arvilla Shooter and Ed Simovich of the incident. Based on demeanor, clarity of recollection, Larson's admission that he was proceeding without any plan to stop in the event that he endangered the pickets' wellbeing, that to stop would cause the material being transported on the forklift to

fall off and cause added danger, as did occur, and inherent inconsistencies in his testimony, his testimony is not credited.

20. The Incidents of December 15, 1979

On December 15, Joe Solis was picketing at the Troy Street entrance with approximately 10 other individuals including Frank Zamora, Steve Baugh and Ricky Craft. While picketing, a truck drove up to take delivery of a forklift. Baugh and Solis informed the driver that they were on strike and asked, since the truckdriver was a union member, why he did not respect the picket line. According to Solis, the truckdriver exhibited consternation as to what course of action he should take and stated he was going to telephone his superior for guidance. The truckdriver left his vehicle, went into the office, came back and told Tom Simovich he was not going to take delivery of the forklift. Solis asserts that Tom Simovich

got very angry and said that all the picketers present were fired, that they would never have jobs again. Simovich then assertedly pointed at Solis and told him, "Solis, I guarantee you, I'm going to send you to jail for 5 years, and 3 years at the least." Baugh corroborated Solis' testimony. Tom Simovich did not expressly deny the allegation. According to Tom Simovich, Solis, among others including Ortiz, would tell individuals attempting to pick up products that they best move on if they didn't want their trucks destroyed, but there was no indication that he actually heard them make such threats. The truckdrivers or other representatives of these companies that were attempting to pick up Champ products did not testify and no explanation was advanced for their absence.

21. Other Incidents Occurring in December

As previously indicated, Frederick Bruce Gary left his employment with the guard service and commenced working for Respondent on December 12, 1979. According to Gary, during December of 1979 through January of 1980, Eduardo Ortiz threatened him by stating that it would not be long before Ortiz would get Gary and make sure Gary would not be able to come back to work. Gary also alleged that he was familiar with Steve Baugh's automobile and saw the automobile following him when he was leaving the plant to make a delivery one day. He asserted that Steve Baugh followed him on two occasions. Steve Baugh admitted following Gary, but there was no indication that there were any overt threats by Baugh directed at Gary by these actions. Further, Gary asserts that in January Ramon Rodriguez said that he was going to pin him down to the

street and beat him up.[65] Gary admitted that at the time of the incident he had never previously met Ramon Rodriguez or worked with him. He was told that the individual was Ramon Rodriguez but could not remember when he was told this; it could have been a week after the incident. He was shown a picture of Rodriguez and was asked to identify the individual pictured. It was the only picture shown him. In his affidavit given May 27, 1980, Gary stated that Ramon Castillo was the one who threatened him. Gary testified that was a true statement. When asked the name of the individual, he stated that the picture he identified with Ed Simovich was Ramon Rodriguez. Ed Simovich stated it was Ramon Rodriguez. When asked why he identified the individual as Ramon Castillo, he accused

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[65] Gary wasn't sure whether the threat was made in December or January.

Counsel for General Counsel of making a mistake in the affidavit even though Gary admitted reading through the document when he signed it, and he is now testifying that Ramon Rodriguez was the proper identification. The demeanor of Gary did not exude trustworthiness. The manner in which identification was made, including the uncertainty as to name, lends little or no credibility to Gary's testimony, and it is so found.

Other events recorded by Deputy Sheriff Stead in December are: On December 11, 1979, an employee named Shuey was stabbed in the parking lot at the 2439 address; no arrests were made and no clear identification of the perpetrator received. There was an unsubstantiated allegation that the assailant was a friend or relative of Ramon Rodriguez. Also during the month of December, Deputy Sheriff Terhorst drove to the Respondent's

premises in a van which contained a smoked glass window in order to monitor activities. He was able to observe the picketers and noted two occasions when cars were stopped and had to wait approximately 5 to 10 seconds in order for the pickets to clear the driveway. He observed Eduardo Ortiz bang on a fender and appear to shout at people inside the car. The second day he again noted the pickets slowing ingress into the plant but he did not recall Ortiz being there the second morning. There was no indication that Terhorst communicated this information to Respondent; therefore, it will not be relied upon in reaching a decision herein.

Rene Gonzales, who commenced employment with the Company on May 8, 1978 and continued working throughout the strike, stated that in December he had an occasion to park his car three blocks from the Company because he caught a ride there with another

man to ensure that his car did not sustain damage. At one point he did notice that a tire on his vehicle was punctured, sugar was placed in his gas tank and acid was applied to the paint. Also in December, on or about December 10, one of the guards asserted that he was challenged to a fight and actually engaged in fisticuffs with some unidentified picket.

Richard Gerhardt, the leadman in the welding shop, stated that on December 15 he reported damage to his son-in-law's car. There were nail holes in the sides of the tires but he never personally saw any nails or tacks in the driveways to the plant or on Rosemead Boulevard. Also in December, as previously discussed, Charles Lee Davis reported that his home was damaged.

22. The Events of January 4, 1980

Ed Simovich alleges that at quitting time on January 4, 1980, he observed

Armando Escandon kick and hit the driver's side of a car with his fist. The car was driven by Carlos Lopez. He also recalled Escandon taking a wad of money on two or three occasions, unfold it in front of the window of a car as it was leaving the plant, and run it through his fingers and show it to Ed Simovich. Ed Simovich could not recall what Escandon said at that point.[66]

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[66] After having his memory refreshed from a notebook that he kept during the strike, he averred that on January 16 Armando Escandon dared Roberto Corona to get out of a vehicle and fight. Simovich claims that he observed the conflict on January 16 but had no recollection as to when he entered the allegation into the diary. Furthermore, Roberto Corona did not testify in corroboration of this testimony and there was no further explanation regarding the genesis of the incident or whether it actually resulted in fisticuffs. It is noted that Escandon, when he testified, needed the services of a translator although he did exhibit some comprehension of English. Escandon testified he does not speak English but does understand a little English. Ed Simovich indicated in his testimony that he could not speak Spanish. He did not explain how he understood what Escandon said to

(continued...)

23. The Events of January 8, 1980

As previously discussed, on January 8, 1980, there was a negctiating session attended by Ed Simovich and Ed Hoy for the Employer and Gazzigli, Zamora, Gresko, Baugh and Craft for the Union. The strike was discussed and Hoy stated, as the position for the Employer, that the Company had replaced the strikers, that they didn't really need a contract, that they didn't need the strikers back and that they were operating with permanent replacements. Specific strikers were not mentioned. Also discussed was Hoy's request to submit language to the Union that would hold the Union liable for any property damage incurred during the course of the

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[66](...continued)
Coronado. The lack of corroboration, without explanation, and the unexplained understanding of the conversation, cojoined with the other reasons stated herein, warrant the finding that Ed Simovich's testimony is not credible.

agreement. Gazzigli stated that he did not think the Union would agree to such terms but they would consider such a submission and he would forward it to the Union's Legal department for review. Hoy did not have a written proposal to submit at that time but said the Company was very adamant that something had to be included in the manner of indemnification if there was ever going to be an agreement.

After the meeting, Craft and Baugh went to the picket line to inform the strikers of what transpired during the negotiating session. Both Baugh and Craft observed Tom Simovich threatening Solis with arrest and a jail sentence. According to Solis, he was picketing in front of Respondent's offices on Rosemead Boulevard when Tom Simovich escorted two replacement employees through the picket line and, after leaving Company property, informed the

replacements to come back later. Solis and several of the other picketers were attempting to persuade the replacements to honor the picket line. Solis had known one of the individuals from a period 2 years prior to the incident when they were working for Champ and placed a hand upon his shoulder while they were talking.

Tom Simovich started hollering at them at that juncture stating, "To get out of the way or he was going to have all of us arrested." The picketers then assertedly started hollering, stating they wanted a contract. Tom Simovich then said, according to Solis, that the strikers did not have a union and that all the strikers will never come back to work again at Champ. It is also claimed that at some juncture that is unclear in the testimony, Tom Simovich told Solis that he was going to jail right then. Solis inquired why, that he didn't do anything.

Then he turned to the replacements and asked if he assaulted them or in any way injured them and the individual that he had known previously shook his head no. Since Tom Simovich had told Arvilla Shooter to call the police, the police arrived in two vehicles and Tom Simovich pointed at Solis and told the policemen "to take him in, to make sure that they took him in." Solis told the police that Tom Simovich was sick, that he's crazy, that Solis did not do anything to the replacements. The policemen then separated Simovich and Solis and talked to them individually. Tom Simovich then left the area after stating to the police that they "should make sure to take Solis in." The police asked Solis for identification, he complied and was never arrested in connection with this incident.

According to Craft, who gave a very clear and convincing rendition of the

incident, it was after Solis placed his hand on a replacements shoulder while trying to cajole him to honor the picket line that Tom Simovich yelled, "Okay, you've done it, you've assaulted the man." He then yelled at someone inside, Craft was not sure who, to call the police. Solis then turned to the striker replacement and inquired if they were just talking, and the guy shook his head yes. Approximately 20 minutes later, two police cars came and the policemen talked to Solis and Tom Simovich and then informed all the pickets that they were just going to file a report. The police also informed Tom Simovich that if the strike replacements wanted to file charges, they were to go to the police station in the morning. Tom Simovich and Joe Solis then got into a little argument wherein Tom Simovich told Solis, "I know more about you than you yourself, and next week you're going to jail for five

years, three years minimum." Solis got pretty angry at that juncture and used the language of Billingsgate in stating his point of view to Tom Simovich. Baugh also heard Tom Simovich tell Solis he was going to go to jail for 5 years. Baugh further asserts that Tom Simovich then turned around and said to him that if he stayed there he was going to be arrested too. As previously indicated, the testimony of Craft, as corroborated by Baugh and Solis, is credited.

24. The Events of January 16 and 17, 1980

On January 16 or 17, Richard Gerhardt, currently leadman in the welding shop, reported to Ed Simovich that, as he was driving out of the driveway at the plant, Eduardo Ortiz spit on him through the

window.[67] Gerhardt testified that the incident occurred on November 30, 1979 at 4:30 p.m. as he was riding with his son-in-law and another individual. It is asserted by Gerhardt that as they were coming out of the driveway waiting for traffic to clear, Ortiz, who was standing about 2 feet away from the car, shouted profanity at them and then spat at Gerhardt. The spittle landed on Gerhardt's shoulder. The traffic cleared at that point so Gerhardt's son-in-law pulled into traffic and they proceeded home. The following day Gerhardt notified the guard and pressed charges against Ortiz. He was instructed when the sheriff's deputies came that he, Gerhardt, had to place Ortiz under citizen's arrest for assault, which Gerhardt did. After Gerhardt

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[67] As previously indicated, Ed Simovich also reported that Armando Escandon dared Roberto Corona to get out of his vehicle and fight on January 16.

placed Ortiz under citizen's arrest, the sheriff handcuffed Ortiz, searched him and placed him in the back of the car. He told Ed Simovich about the Ortiz incident, that Ortiz was arrested. At the time Gerhardt testified, the matter was still pending and there had been no disposition of the charges at the close of this proceeding.

According to Ortiz, he was arrested twice on January 17. The first incident occurred at approximately 10 a.m. while he was picketing. Ortiz asserts that on January 16 he saw Gerhardt in a large passenger car with three other individuals proceeding slowly down the driveway. He noticed Gerhardt trying to collect saliva in his mouth and then start to draw the sides of his mouth together, pursing his lips, preparatory to spitting. Ortiz claims to have seen Gerhardt previously attempt, sometimes successfully, to spit at picketers. While

Gerhardt was preparing to spit he was rolling the window down, so Ortiz leaned forward in order to catch the spittle on his chest, which he did. Then he claims he stepped back and spit at Gerhardt in return. The driver then stepped on the gas and kept going. The incident was observed by a guard and a police officer. According to Ortiz, the guard turned to the police officer after Ortiz spit at Gerhardt and said did you see that. The police officer indicated that there was nothing wrong and he was not arrested that day. The following morning Gerhardt approached him accompanied by one police officer and arrested him. Gerhardt stated that this was a citizen's arrest. Ortiz did not say anything. No basis for the arrest was stated until after he was placed in a police car and the officer inquired why he spit in Gerhardt's face. Ortiz replied that it was

because Gerhardt tried to spit in Ortiz's face.[68]

According to Art Van Haasen, who was assigned to stand at the gates at the close of the day to assist the employees in making their egress from the plant, he had stated that if employees opened windows some of the picketers would spit in their faces. He never saw a picket spit in the face of any employee but he saw them try, and in particular he saw Eduardo Ortiz try to spit in an employee's face. The car involved at that time was Arturo Nieblas' car, he believes, or at least the employee involved was Arturo Nieblas. He couldn't recall whether it was Nieblas' car. He did not see the Gerhardt incident.

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[68] It is noted that Gerhardt stated Ortiz spit and it hit his shoulder.

Ortiz was taken to the Temple City Police Station and remained there until 2 or 3 p.m.[69]

Prior to being released, according to Ortiz, the police inquired if he was going to return to the picket line and he responded in the affirmative. The sheriff's deputies then informed him that it was okay for him to leave. Ortiz was picked up at the police station by Mary Garcia and Frank Zamora who took him back to the picket line at about 3 p.m. He told them that he felt that the police were going to arrest him again because

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[69] Two individuals that Ortiz saw spat upon were Jose Naranjo and Carlos Almaroz. He saw Vallejos spitting at Naranjo and an individual by the name of David spitting on Carlos Almaroz. Based on this testimony, it is possible that he did not see Gerhardt personally spitting at other people prior to the incident but, because of the difficulties in translating the numerous incidents testified to, the record is unclear if Ortiz specifically saw Gerhardt spitting upon another individual prior to the incident of January 16.

of the questions they asked him prior to his release.

According to Deputy Sheriff Thomas Gordon, at approximately 4:30 p.m. he was assigned to work a security detail at Respondent's plant pursuant to a directive issued by Sgt. Williams, who stated that there had previously been an arrest at the plant that day and there was the potential for further problems occurring at the Company. About three units had been assigned this security detail and they parked about 50 feet south of the main driveway on the east side of the street. They exited their vehicles in order to view the picket line activity.[70] After observing the activity for about half an hour to an hour,

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[70] It should be noted that the testimony involving the prior security detail described hereinabove did not exit their vehicles for viewing the picket line.

they noted that as employees exited the plant, the pickets engaged in a lot of yelling and were standing or jumping in front of cars as they started to move. A lot of the yelling was in Spanish but there were obscenities shouted in English. He effected two arrests that day. He arrested Eduardo Ortiz and Ramon Rodriguez for disturbing the peace.

Gordon asserts that Ortiz yelled expletives, yelled get out of the car, and yelled that he would kick a posterior. Rodriguez assertedly made similar statements. Further, he claims he saw Ortiz stand in front of a yellow Pinto and, while yelling obscenities, pounded on the hood of the Pinto with both his hands with the palms open. Concurrently, he asserts Rodriguez was standing in front of the same car pounding on

the right front fender and hood with his left fist.[71]

Gordon stated that he cannot recall any representatives of the Company being present at the time of these events. They failed to get the name or identity of the driver of the yellow Pinto but were assured by a security guard that a Company official would subsequently supply that information. The arrest report indicated that Gordon was advised by Deputy Stead of possible trouble at the plant because one of the strikers had been arrested earlier that date but he does not believe he knew it was Ortiz who had been

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[71] The officer asserts that Ortiz made a threat about further difficulties arising out of the arrest, including blowing up a car. However, this threat was never included in the arrest report and no charges were brought regarding the threat. There was no indication that the Company officials were ever told of the alleged threat. Accordingly, this allegation will not be considered in reaching a decision herein.

arrested nor does he recall being aware that it was a striker who was arrested.

According to Ortiz, prior to being arrested the second time, he saw a police car across the street approximately 200 to 300 feet away parked behind a palm tree. Subsequently, there was another police car parked in the alley near the 2500 Rosemead Boulevard entrance. Suddenly the police cars came and Sgt. Williams was present. Gordon testified that Williams was not present. Ortiz clearly remembers the presence of two police cars and that they arrested Ramon Rodriguez and himself. Ramon asked why and the police told him to get in the car, twisted his hand and pushed him into the vehicle. They then called to Ortiz and stated that he too was under arrest. He inquired why and discussed the matter with Sgt. Williams. Ortiz asserts that he knew Sgt. Williams because, at the commencement of

the strike, Sgt. Williams instructed him that he did not want any problems and that to avoid problems he was not to touch a car or a person or else he would go to jail. Ortiz, again claiming that he anticipated being arrested for a second time that day, kept his arms folded in order to comply with these prior instructions of not touching anybody or any vehicle to avoid getting into trouble. He told Frank Zamora and Mary Garcia that while he picketed he was going to do it in a manner where his arms were crossed in front of him so that they would "have to arrest him for doing nothing." Ortiz claims that Tom Simovich was in the area at the time of the arrest telling the police to also pick up Mary Garcia and Frank Zamora. Ortiz described Tom Simovich as yelling like a

cheerleader, clapping his hands while they were being arrested.[72]

The arrest of Ramon Rodriguez was the second arrest of this picketer during the

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[72] Ortiz further denied being accused of throwing rocks at any employees in January of 1980 and denies ever throwing rocks at anybody. Ortiz also denies ever kicking or striking an automobile driven by Roberto Corona whom he knew by the name of "Cuchillo." Ortiz denies knowing anyone by the name of Rudy Korste. Further, he denies ever following anyone home from the plant, making obscene statements to Gary or threatening Gary, but did admit using several expletives when he talked to Gary. He denies ever seeing any nails in the street or in the driveways of the plant during the strike and denies ever throwing nails under a truck. He recalls having a discussion in March 1980 with Det. Terhorst wherein Terhorst inquired if he threw some nails under a truck and Terhorst indicated that there was a complaint that he threw some nails. They then inspected Ortiz's vehicle and did not find any nails in the trunk or elsewhere. He was not arrested when they checked his vehicle for nails. At the same time they were discussing the nails, he was told that a windshield on a white Freightliner truck driven by an individual named Rudy was broken but he denies any relationship to that event or any culpability for it.

course of the strike.[73] Rodriguez's version of the January 17 incident is that he was taking his turn at picketing on that date with approximately 8 to 10 colleagues. Also present were Tom Simovich, Tom Simovich, Jr., and two or three officers and security guards. At one small juncture in the picketing, Tom Simovich accused him of hitting a car and then the police arrived and arrested him. Tom Simovich told the police several times to pick him up, stating that he had hit a car, that he kicked a car. Rodriguez denied even having the facility to kick a car because at the time he was wearing tennis shoes, which would have precluded that type of activity.[74] He also related an

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[73] As previously discussed, he was arrested on October 19, 1979 when he got into an altercation with Freddie Vallejos.

[74] While testifying about the January 17 incident, he was asked about several other allegations and denied being in any fights (continued...)

incident where two individuals were exiting the plant in a Chevrolet station wagon and they stopped the vehicle. Both occupants of the vehicle had beer in their hands and stated they wanted to fight him. Rodriguez assertedly said he didn't say anything to those individuals. One individual got out of the car first, the passenger, who claimed he was a boxer. He hit Rodriguez first, once in the chest and the second time in the nose which started his nose bleeding. The driver also got out of the vehicle but did not engage in any violence. Rodriguez was then taken to the hospital and Mike Simovich[75] came to the scene with police cars, and the

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[74](...continued)
other than the one alleged to have occurred on October 19 with Freddie Vallejos. He did admit to having exchanged obscenities with various employees.

[75] Rodriguez indicated that the individual who came out was Tom Simovich's brother and the only brother identified on the record was Mike Simovich.

police did take a report. He does not know the name of the individual who identified himself as the boxer but Rodriguez said that he had seen him working in the Company prior to the fight. There is no showing that Respondent attempted to identify the alleged assailant or if he knew the identity to discipline the individual. Rodriguez also denies kicking Freddie Vallejos' car in 1979. He stated he didn't even know which car belonged to Vallejos or the type of vehicle he drove. He does know an employee by the name of John Hong and saw him working at Champ prior to the strike, but denies ever striking Hong's vehicle with his fist while it was passing through the picket line. As previously related in the discussion of the November 28 incident, he stated that Hong's vehicle almost hit him and he struck it in an attempt to avoid personal injury, by placing his hands on the vehicle to help him jump

back out of the path of the car. Rodriguez's uncontroverted testimony is that he went to court on the charges pending against him and was found not guilty. He did get a ticket or citation that he did not know about until he went to court. He paid a $70 fine.

The testimony of Joe Solis corroborates the statements of Ortiz and Rodriguez. Solis asserts that on January 17, while picketing with approximately 15 other individuals including Frank Zamora, Ray Garcia and Ernesto Arroyo. Tom and Ed Simovich and Art Van Haasen were standing on Company property as the workers were leaving. Tom Simovich was instructing the departing employees to keep going. Solis felt he was instructing them to run over the picketers. Solis noticed the presence of three or four police cars. At some point, Tom Simovich started pointing at picketers, stating "take him, take him." Rodriguez and Ortiz were

arrested. Tom Simovich also pointed to Mary Garcia, indicating he also wanted her arrested. At that juncture, Sgt. Williams told Tom Simovich to get back into the Company, that he would take care of it. Tom Simovich did not testify about the incident. Art Van Haasen, while stating that one of his duties during the strike was to stand at the north gate at 2500 Rosemead to assist employees leaving the plant did not testify about the January 17 arrests.

25. The Events of January 18, 1980

Sheriff's Deputy Stead testified that on January 18, 1980 he went to Respondent's plant regarding reports of vandalism and the December 11, 1979 incident where Jerry Shuey was stabbed. Approximately a week before January 18, he conversed with a picket captain whom he instructed regarding all lawful picketing. He told the picket captain that the individuals picketing could

not block the sidewalk or driveway, that they had to keep moving at all times and could not loiter in the driveway or block vehicular and pedestrian traffic or otherwise interfere with people going and coming to work. On January 18, 1980, Stead parked the police vehicle he was operating approximately 5 to 10 feet north of a driveway on Rosemead Boulevard. He did not exit the vehicle, but stated it was a clear day and he had an unobstructed view of the main driveway. He observed a 1964 four-door blue Chevrolet stopped at the driveway as if attempting to go in the driveway. Stead asserts that three picketers stood on the sidewalk, that the operator of the vehicle honked the horn once, and that one of the picketers, later identified as Banaga, stood in the vehicle's path motioning with his arms as if to direct the vehicle to proceed through the driveway but did so while standing in the driveway

blocking its path. The vehicle did not have room to enter in his estimation. He subsequently arrested that picket, Banaga, as well as two others. Initially, he stated Eduardo Ortiz was one of the pickets but, after refreshing his memory, stated that the other two pickets were Cesar Moran, Banaga and Alberto Cortez. Alberto Cortez, Cesar Moran and Vicente Banaga all deny any wrongdoing on that date. They all claim that they were picketing in a lawful manner and that they did not impede the flow of traffic into the plant. Alberto Cortez stated that was the only time he was arrested, as does Moran.[76] According to Cortez, the only representative of the Company who witnessed the arrest was Art Van Haasen, who inquired why the authorities were arresting the three

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[76] As previously discussed, Banaga was also charged on October 21, assertedly for breaking the window of a Toyota.

pickets. The charges were dismissed on December 4, 1980.

26. The Events of January 23, 1980

On January 23 there was a negotiating session. The Company was represented by Ed Hoy and Ed Simovich. Present for the Union were Gazzigli, Zamora, Baugh, Gresko and Ricky Craft. According to Gazzigli the negotiators specifically discussed the additional holidays that were granted up to that point, including the day after Thanksgiving and the 2 additional days granted the employees during the Christmas-New Years period. Gazzigli inquired if the Employer paid the employees for those additional holidays, and Hoy assertedly said no, they had not, that the plant was closed

down those days for production reasons only.[77]

Craft also believes even that Hoy raised the issue that the Company had filed a request for an injunction against the Union for having too many pickets at each gate and requested cooperation from the Union regarding this matter. According to Craft, the Union indicated they would give the Company all the cooperation they could.

Gazzigli then asserted that since he had doubts that the Company did not pay the employees for the additional holidays, he sent a formal letter requesting the Company's payroll records for the period in question and further requested any memos that might have been posted discussing the holidays or

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[77] Ricky Lynn Craft corroborated Gazzigli's testimony that they discussed the additional holidays, the Company stating it had not given additional holidays.

the plant closure. Gazzigli sent the letter February 19, 1980.

Hoy replied to the letter on March 12, 1980, stating:

> Regarding your letter dated February 19, 1980 requesting certain data from the Company, it is our opinion that your requests are covered in full in the unfair labor practice charge you have filed with the Board, and therefore, I am sure that you will agree, rather than duplicate the efforts of the company's limited staff, we will be answering your requests, I believe, through the investigation of the charge by the Board.
>
> If we can be of further assistance, please do not hesitate to contact us.

Hoy and Ed Simovich did not specifically controvert Gazzigli's and Craft's

representations of the events occurring during the January 23 negotiating session.

27. Other Events in January 1980

The Respondent alleged a number of other strike-related incidents occurred during January but the specific dates were unknown. For example, Respondent alleges that in January, Joe Solis spit on Bruce Gary's windshield and called him a "dirty name." Also during January it is asserted that Freddie Vallejos had the tires of his vehicle punctured and brake fluid squirted on his car; that Paul Escoto had four tires punctured on his vehicle at his home and had some paint remover sprayed all over the car; that Jim Shertz, on the same date, had a car parked at the house he was renting and that someone punctured tires on his car and his landlord's vehicle. Also during January it was asserted Ortiz was accused by Perry Acosta of throwing something at Acosta and

Jim Gray. Perry Acosta assertedly filed a police report on January 9. The allegations did not result in Ortiz being charged with a crime.

Another event assertedly occurring in January 1980 was the subject of testimony of both Gary and Ortiz. According to Gary, one morning as he was pulling the truck he was driving up to the curb, Ortiz shouted something at him. After Gary finished parking the truck, he went to the back of the vehicle to determine what Ortiz was talking about. Ortiz shouted a couple of obscenities at Gary. Then Gary and Ortiz exchanged obscenities and Gary claims he turned around and went toward the cab of the truck. But prior to reaching the cab, Ortiz came up behind him and kicked him in his left thigh. Gary then claims he started to chase Ortiz who was running across Rosemead Boulevard. Gary also claims that when Ortiz reached the

center divider that he fell because the area had been watered that morning and was muddy. Gary denies having any weapon in his possession during the incident. Gary also denies that he drove the truck close to Ortiz or Ortiz's car. Gary claims he never struck Ortiz or any other picketers with his truck. He denies striking Ruben Gutierrez with his truck even though he was so accused by Gutierrez.

According to Ortiz, he and Elpidio Cortez were parked in Ortiz's car. Elpidio left to attend to personal needs and, as Ortiz was attempting to exit his car, Gary passed by in a truck, driving unduly close to Ortiz. He believes it was a Company truck that Gary was driving. It was a flatbed truck loaded with axles. The axles assertedly stuck out beyond the sides of the truck and therefore if the truck was about 3 feet away, the axles came within 6 inches of Ortiz.

According to Ortiz, if he did not get out of the way Gary would have hit him with the axles. After Gary passed by, Ortiz claims he yelled, "Don't do it again." Gary then stopped the truck and came down to where Ortiz was parked. Gary, according to Ortiz, was holding a knife and he started chasing Ortiz. Ortiz claims he ran into the middle of the cars trying to run across the street, and as he was attempting to escape Gary he twisted his ankle. He had to go to the Monterey Hospital. Gary did not catch him because Elpidio Cortez finished taking care of his personal needs, heard the commotion of the car slamming on its brakes, came out of the portable toilet and inquired what was occurring. When Gary saw him, he went back to his truck.[78]

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[78] According to Ortiz, he did not break any bones, he just required some heat treatment for his ankle. Ortiz could not (continued...)

Also during January, Nestor Lopez alleged that Francisco Zamora said things to him that he found objectionable; some profanity was involved. It was also during January that Peterson asserts Ortiz struck his vehicle with a picket sign and that sometime in January, at about the same time, some fluid was thrown against his vehicle which took the paint off in three or four places, the paint bubbled and blistered. Also during January, Carlos Lopez, who was hired in December 1979 after the strike commenced, was leaving work when he was delayed by pickets. He got frightened

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[78](...continued)
remember the date of the incident with Gary. He knew it was after November and that it occurred in 1980, but could not recall the month. According to Ortiz, the incident occurred around 3 p.m., not, as Gary asserts, around 10 am. Although Elpidio Cortez appeared and testified at the trial, he did not testify as to the Ortiz-Gary incident. There is no indication that Ortiz flied a complaint regarding the incident.

because expletives were directed at him, so he accidentally hit the gas pedal. He denies striking any of the picketers. He did state that the strikers accidentally were touched by the edges of the vehicle when he inadvertently touched the accelerator, but that the front of the car did not strike anyone. He also stated he braked and then proceeded forward very slowly, but the picketers started to hit and kick his car and told him to get out of the car. The kicks damaged the car but he continued moving. After several questions, he did admit that the car did strike the pickets at one point but he claims that he was going approximately 3 miles an hour or less. He also stated that he accelerated the car twice. After the pickets started kicking the car on both sides, he became extremely nervous so he accelerated again. The pickets were shouting expletives at him at the same time they were

kicking the vehicle. The witness denies being warned by Art Van Haasen about the incident but, after subsequent questions, admitted that his foreman, who was named Art, did warn him about leaving the premises at a rapid rate of speed and instructed him to keep calm the day after the incident.

Subsequently he testified that the first time he accelerated they did not actually touch anyone with the car and stated he was not too nervous to observe whether his car struck any of the picketers. He stated that the second time he accelerated, he pushed some people out of the way but did so going very slowly. He stated he pushed about five picketers. He admitted that they seemed very angry after they were pushed. The witness admitted being very angry, feeling insulted and as if he wanted to fight someone. However, he denies ever challenging any of the pickets to a fight and he denies

that the incident was anything but accidental. Demeanor, lack of candor, inconsistencies in testimony, a claim of confusion over the language even though he had the services of a translator, all diminish his credibility. However, his adverse admission about the vehicle striking pickets will be credited.

According to Art Van Haasen, the incident occurred on January 4, 1980 at about 4:45 p.m. Van Haasen described the shouting as much louder than normal. He saw Carlos Lopez trying to pass through the picket line and being obstructed by the picketers. According to Van Haasen, the picketers, including two unidentified women, were standing in front of the vehicle shouting, "come on, hit me, hit me." Lopez, for some reason, put his car in gear or something and all the picketers jumped back thinking that they were going to be struck by the vehicle.

Lopez, according to Van Haasen stood on the brakes at that juncture and no one was struck. The picketers then started banging on the hood of his car and Lopez was attempting to get out when Larry Rincon came out, calmed the picketers down and got them out of the way. The guards also assisted.

According to Rincon, on the day Lopez was leaving the plant Rincon was in the vehicle behind him edging out through the picket line which was blocking their egress. Rincon said he was moving slowly and suddenly Lopez's car jerked but did not move forward much. The action appeared to irritate the picketers including a couple of "gals." Alberto Cortez assertedly was standing in front of the driveway and he started pounding on the car telling the driver to hit him, and apparently by that action the rest of the picketers started surrounding, kicking and shaking the car. They were also screaming

obscenities at Carlos Lopez. Carlos Lopez then attempted to step out of his car, and that's when Rincon got out of his vehicle and induced Lopez to return to his car. Then they got Lopez through the pickets. Based on Carlos Lopez's credited admission that his car actually struck some pickets, Van Haasen's and Rincon's testimony is not credited. Carlos Lopez was not disciplined because of the incident.

Also on January 4, it is asserted by June Rose, the billing and retail clerk as previously described, that she suffered damage to her vehicle at her apartment; most of the windshield was either bombed or broken out. Rudolph Korste asserted that his truck was damaged while parked near his residence during December or January. The damage to the truck has been previously described.

28. The Events of February 4, 1980 and The Decertification Petition

On February 4, 1980, Respondent filed a decertification petition in Case 21-RM-2013.[79] On April 4, 1980, the Acting Regional Director of Region 21, Michael J. Fogerty, dismissed the decertification petition in 21-RM-2013 pending final disposition of the matters under consideration in the instant proceeding.[80]

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[79] As noted by Counsel for General Counsel, the file pertaining to the case in 21-RM-2013 that was introduced into evidence herein indicates that the petition was filed on January 4, but after close examination it was determined that the correct filing date was February 4, which is consistent with the testimony and found to be a fact.

[80] It is noted that one of the bases given for dismissal of the petition by the Acting Regional Director was Respondent's refusal to negotiate with the Union pending disposition of the unfair labor practice allegations, that such action was not supported by valid, objective considerations and was taken in derogation of Respondent's duty to bargain in good faith with the certified representative of the employees. (continued...)

Charles Lee Davis,[81] originated the idea of circulating a decertification petition. According to Davis, the idea originated from an incident prior to the strike wherein Frank Moore and Joe Solis, as well as some other individuals, stated they had a year to reach a contract and since the strike had lasted over the specified time, Davis figured that he could petition for a vote to either terminate the strike or vote the Union out. Davis further testified that he sought the assistance of his father-in-law

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[80](...continued)
The Acting Regional Director's decision has not been successfully appealed. However, his findings are not binding upon the issue here under consideration and disposition of the issues in the instant proceeding will be based solely upon the evidence or record, not the findings of the Acting Regional Director.

[81] Some of Davis' testimony has been previously discussed in that section describing damage to employees' homes and vehicles and threats allegedly made by strikers against employees who continued working during the strike.

who was currently retired but, during his working life, had been active in a union. After his father-in-law telephonically related the proper language to him, Davis asserts that he circulated the petition during his break time one week in January and obtained signatures from all employees with one exception. He then stated that Ed Simovich happened to be walking by after he had the completed petition and he gave the petition to Ed Simovich. Ed Simovich indicated that he would transmit the petition to their attorney. Ed Simovich said he gave the petition to Hoy. Davis then said that he chanced upon Ed Simovich several weeks later during work and inquired how the petition was coming, and was told that it apparently hadn't done much good, to which he commented "damn it."

As previously indicated, Davis was not a very credible witness. He had to be

cautioned to respond to questions fully and freely. His demeanor did not exude candor, and there were inconsistencies in his testimony. For example, he indicated that the reason he initiated the petition was to terminate the strike either by having the employees affirm the Union through a vote or by getting the Union out. He later testified that he initiated inquiries about a decertification petition in September telephonically with his father-in-law prior to the strike. He also stated that he was the individual solely responsible for circulating the petition, yet admitted he did not speak Spanish and did not explain how he obtained signatures from witnesses who could not read or understand English. Another inconsistency was Davis indicated that he initially wrote the petition and then subsequently admitted that the petition was not prepared in his own handwriting but was

written by his wife who assisted in the matter.[82] Inasmuch as the petition was assertedly circulated in January and given to Ed Simovich a week or two later, it is unexplained how, 3 weeks after giving the matter to Ed Simovich, Davis claimed there was information that the petition was not apparently "any good," since the Acting Regional Director did not render a decision until April. It does not appear that Davis misstated the date he circulated the petition since it was dated January 15.[83] Also,

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[82] Another inconsistency noted by Counsel for General Counsel in his brief was that Davis initially stated he did not discuss the petition with anyone prior to circulating it and then, upon further questioning stated that he spoke with his Father-in-law who resides in Illinois to ascertain the proper language to be used in the petition.

[83] Other inconsistencies in his testimony include: In subsequent testimony Davis indicated that he initially inquired of his father-in-law about the decertification petition in December, not September. He then (continued...)

later in his testimony Davis asserted that several individuals assisted him in circulating the petition because he could not

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[83](...continued)
stated that the language of the petition had to be carefully drafted according to his father-in-law, who had been a shop steward for 3 or 4 years. If the initial inquiry was in December, the rendition of the events given by Davis in the latter part of his testimony also contained inconsistencies because he claims that he initiated an inquiry in December when his father-in-law, gave him the language, yet he admitted that his father-in-law stated that it would be necessary to carefully ascertain the correct language to ensure the legal adequacy of the document, and that his Father-in-law had done research into it prior to the conversation in December. Accordingly, his statement that the December conversation was both the beginning and conclusion of the inquiries made to his father-in-law does not appear credible. Davis then stated that when his father-in-law dictated the language to him over the phone, he wrote it down on a piece of notebook paper and it was the notebook paper that he took to work. He then stated that he took quite a bit of time thinking about the matter after he got the language from his father-in-law because he didn't think the strike would drag on that long, he just waited. As was previously discussed, Davis did not take pieces of paper to work that he had written upon but rather had the petitions prepared by his wife.

communicate well with the Spanish speaking employees. The individuals that assisted him were not clearly identified. Only one Spanish-speaking individual was identified as assisting Davis at one of the many locations he circulated the petition. When asked if there were a lot of replacements working at the time he circulated the petition, he said he did not know, which does not indicate candor inasmuch as he previously testified that he circulated the petitions during authorized break times and saw almost everyone who worked at the plant, dealt with them, talked to them and should have had some idea of how many employees were new subsequent to the strike commencing. Accordingly, based on demeanor, an uncooperative attitude, including hostility toward the Union and Counsel for General Counsel, lack of candor and the repeated inconsistencies in his testimony, it is

concluded that Davis is not a credible witness, as previously found.

William Koskela testified that he signed the petition. The petition states: "We, the employees of Champ Corporation, 2500 Rosemead, El Monte, California, do not want the UAW Union Local 509 to represent us." When asked who gave him the document, he stated that "it did--came around, and we all suggested it." He could not recall who handed it to him and he could not recall when he signed it, but he did state that he read it prior to signing it and he thought that he signed it during break time. He did not know who drafted the document. There were discussions among several workers that they should petition to not have the Union. One of the individuals he talked to was Leroy Zook who assisted Davis in one location in distributing the petition. Koskela's suggestion that it was an idea among several

people is in contradiction to Davis' adverse assertion that he alone was responsible, initiating discussions with his father-in-law in Illinois in September, not mentioning any discussions with any of his co-workers and drafting the petition or having the petition drafted at his residence discredits Koskela's testimony that several workers, or the indication that many employees, wanted to "get rid of the union."

According to Gazzigli, on February 4, the day the decertification petition was filed by Respondent, there was another negotiating session held at the offices of the Federal Mediation and Conciliation Service in Santa Ana, California. Present for the Company were Ed Hoy and Ed Simovich and present for the Union were Gazzigli, Frank Zamora, Steve Baugh and Ricky Craft. The commissioner offered his service to the negotiators and stated that

the Company spokesman, Hoy, wanted to meet with the Union because he felt there was a question of representation. Gazzigli replied that he did not feel there were any issues about representation. He did not have any reason to believe that their representation was in question. Gazzigli suggested that Hoy be informed that he should enter the negotiating room and prepare to bargain. The Commissioner left the room and had a conversation with Hoy. Hoy subsequently came in and there was a short bargaining session. Hoy, who testified after Gazzigli, did not directly controvert Gazzigli's assertions as to what occurred during the February negotiating session. Hoy did admit that they did negotiate about several matters including job mobility or Job promotion for workers. The Union had wanted to have more mobility or opportunity for promotion among the workers and proposed a procedure and the

Company had a counter proposal. According to Hoy, the Company also changed its position on management rights.

There was a subsequent meeting on March 4, which was also held at the offices of the Federal Mediation and Conciliation Service in Santa Ana, California. According to Gazzigli, at the March 4 meeting Hoy again stated there is a question of representation, announced that an RM petition had been filed with the Board and that the Company did not want to consider negotiating any further and could not negotiate in good faith since there was, in their mind, a strong question as to whether the UAW represented the employees. Hoy also announced at that time that when the Board did determine the merits of the RM petition and it was dismissed, he would be willing to meet with the Union, negotiating team within 24 hours of the dismissal. Hoy then requested that the meeting be closed.

Hoy initially testified that he attended a negotiating session on March 4 and did discuss the RM petition but he believes they did conduct some negotiations. They had private meetings with the mediator. However, Hoy's affidavit, dated March 18, 1980, which was used to refresh his recollection, stated that he suggested negotiations be postponed until the Board processed the RM petition and that they would meet within 72 hours after an election if an election was to be held. The affidavit reads:

> I informed the union that the company wanted to postpone the negotiations until such time as the NLRB Finished processing the RM petition that had been filed by the company. I said that should the NLRB dismiss the petition, the company was willing to meet with the union and resume negotiations within 72

hours of being notified by the NLRB, that the petition would be dismissed. Gazzigli said that the union was the certified representative of the employees still and he wanted to continue negotiations. At 11:05 am. the conference ended, having started at 10:42 a.m.

Hoy admitted in his testimony that the affidavit was correct. Based on Gazzigli's demonstrated superior recollection of the negotiating sessions and Hoy's reticence to candidly present the facts, Gazzigli is found to be the more credible witness and Hoy not credible. Additionally, Gazzigli's version was also corroborated in Zamora's testimony. Zamora added to Gazzigli's testimony, asserting, without controversion, that after Hoy announced they would not negotiate until 72 hours or 3 days after disposition of the RM petition, they left the room.

29. The Events of February 12, 1980

Ronnie Korste[84] asserted that after work on February 12 he went to a hamburger stand approximately one-half block away from the plant with a coworker. The coworker was Joe Pinzon who did not testify. When he arrived at the hamburger stand, one of the pickets approached him, swung and hit Korste in the jaw and then started running away. Korste asserts that he chased the picket, caught him and started to hit him when another picketer assisted the individual that swung at him. Korste kicked the assistant and that ended the incident. Korste filed a police report. According to the uncontroverted testimony of Martiniano Rodriguez, Korste asserted, after being told by Ed Simovich that the individual who

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[84] Korste was initially hired July 11, 1979 in the assembly department and continued working through the strike.

perpetrated the crime was Martinlao Rodriguez, that Rodriguez was the culprit. Korste admitted in his testimony that Rodriguez was not the perpetrator of the crime, that it was a false identification, but did not explain that the improper identification was made with the assistance of Ed Simovich. Also according to the uncontroverted testimony of Martiniano Rodriguez, once he got to court pursuant to the subpoena served on him, Korste admitted that Rodriguez was not the perpetrator of the assault, that Ed Simovich placed several pictures on a table in front of Korste and Korste claimed it was Simovich who identified Martiniano Rodriguez as the assailant. After the court proceeding ended in either April or May 1980, Martiniano Rodriguez was given a letter from the County of Los Angeles Office of the District Attorney to the effect that the District Attorney had reviewed all of the

evidence presented at the formal hearing recently and concluded:

> This review fails to justify any criminal action, consequently, no further action will be undertaken.
>
> Victim stated you were not the suspect.
>
> Although you were subjected to an unfortunate experience, the facts do not signify a criminal prosecution and, therefore, no further action is contemplated.[85]

30. The Events of February 27, 1980

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[85] Ed Simovich asserted that Korste made a positive identification of Martiniano Rodriguez from some pictures he had taken. The Company attempted to take extensive pictures of many strike activities and, therefore, had in its possession pictures of many of the strikers. Neither Korste or Simovich talked to Martiniano Rodriguez prior to filing charges with the police. As previously indicated, Ed Simovich was found to not be a credible witness.

Francisco Zamora asserts that on February 27, 1980, while picketing, Tom Simovich left the office building and approached one of the pickets, Filiberto Ruiz, and Zamora. It is claimed that Tom Simovich told Ruiz that he didn't want Ruiz's picture because he was considered a "good guy, but that I [Zamora] was a $50 photograph," and Tom Simovich aimed the camera that he was carrying at Zamora. Zamora had just walked into a portable toilet and closed the door to prevent his picture being taken. At that point, Zamora then left the portable toilet and heard Mary Garcia tell Tom Simovich, "Hey, Mr. Tom, how about Simovich, "Hey, Mr. Tom, how about calling you what you called Carlos [Almaroz] yesterday?" Tom assertedly replied to Mary Garcia, "You know what you are," and kept going to the other side of the street.

31. <u>The Events of February 28, 1980</u>

According to Carlos Almaroz, while he was picketing on Troy Street on February 28, 1980 with two or three other individuals, including Jose Villavicencio and Salvador Garcia, he saw a bottle flying through the air toward a working forklift driver. He does not know the name of the forklift driver. He observed the bottle hit the ground near the forklift driver. The forklift driver jumped off the vehicle and started yelling at Salvador Garcia because he thought he was the perpetrator of the incident. Garcia did not say anything. According to Almaroz, Garcia does not speak English and evidently the forklift driver was talking in English. The forklift driver then entered a Company building and a few minutes later Tom Simovich and Larry Larson accompanied the forklift driver out to where the pickets were located. The forklift driver was informing Tom Simovich that

Salvador Garcia threw the bottle and then Tom Simovich pointed at Almaroz and said, "I bet you this man is the one that did it." The forklift driver assertedly said no, he did not do it and again referred to Garcia. Almaroz inquired why Simovich was blaming him and Simovich replied, "I do not know, but I have a feeling you are the one who threw the bottle." Almaroz stated he did not throw the bottle and Tom Simovich then cursed at him and inquired why he did not go back to Mexico and make two pesos a day. Almaroz replied that he would go back to Mexico and make two pesos a day and that Tom Simovich could go back to his company and make how much he was making, probably less than Almaroz was making in Mexico. About 15 minutes later a police officer walked out of the building with Tom Simovich and began taking down license plate numbers and looking around the area. The police did not talk to Almaroz. Almaroz told

Tom Simovich he did not need his Job, that he could work at another place at another job, and Tom Simovich assertedly replied, "Okay, I want you to try and you will be lucky if you get one because I am going to give you a bad reputation to every job that you go." Almaroz does not know who threw the bottle at the forklift driver. He did see it flying through the air toward the forklift driver, but no one was close to him when the bottle was thrown. The forklift driver did not appear and testify.

32. Other Events Occurring in February 1980

Alfredo Cisneros testified that one morning in February as he was coming to work with Rene Gonzales, going through the main gate at 2500 Rosemead, he saw an individual named Carlos [Almaroz] holding a beer bottle in his hand and, as he came towards the car Cisneros was riding in, Almaroz threw the

bottle at them. Cisneros alleges that the bottle struck the car on the right side right on front of the door, and as the car stopped, he got out of the car and asked Almaroz why he threw the bottle at them. Almaroz allegedly had a piece of tube in his hands 3 to 4 feet in length made out of metal and, after showing the tube, he told Cisneros to come on, but the witness determined he couldn't do anything and returned to the car and they departed. That was the only incident where something was thrown at Cisneros. It is noted that Cisneros was hired after the strike commenced. He went to the Company to seek employment and spoke to Larry Rincon and Ed Simovich. Prior to going to the interview, he knew Rene Gonzales who was working for Respondent. Cisneros had knowledge that several employees had gone out on strike when he walked through the area. Cisneros testified that he went to work the

same day he filled out his application. He did not have to take a physical prior to the commencement of employment and he had not taken a physical as of the date of his testimony. Cisneros operates a drill in the forklift department at the Company.

He commenced employment at $4 an hour and is currently earning $6.10 an hour. During his employment interview, he talked to Larry Rincon and Ed Simovich between 15 and 20 minutes and was informed as to the nature of the job. There is no indication that he took any test to demonstrate the skills he held to qualify him for the Job. After the interview, Ed Simovich took him to his place of work where he was introduced to Bob Peterson. Ed, according to Cisneros, instructed Peterson that Cisneros was going to commence work and that Peterson was to instruct him "how to work." It appears from Cisneros' testimony that he is in the process

of learning skills needed by Respondent. He is practicing on different machines, being taught by Bob Peterson and learning machine shop skills.

Rae Gonzales alleged that, either in February or March 1980, Carlos Almaroz[86] threw a bottle at the car as he was coming to work with Alfredo Cisneros in Gonzales' car. Cisneros got out of the car to argue with Almaroz but said nothing to him because Almaroz was holding a metal rod in his hand at the side of his body and assumed a posture that they considered threatening. Therefore, Cisneros got back into the car. Gonzales did not see the bottle strike the car. He saw it fall on the sidewalk. He identified it as a

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[86] The Carlos he identified was the Carlos in the green shirt, which Respondent asserts was Carlos Almaroz. He almost always wore a green shirt, they claim. Almaroz denies wearing a green shirt unusually often and stated other individuals also wore green shirts.

beer bottle. Subsequently, Gonzales stated that he could not tell what kind of bottle it was. He didn't see it well, he just noticed it was a bottle. He noted a dent in the car when he went inside the plant on the side of the passenger door.

The bottle was not broken and he identified the object that Carlos was holding as unpainted iron. Gonzales' testimony is not found to be greatly credible based on demeanor, the fact that he was shown to use unwarranted embellishment such as stating that the bottle was a beer bottle and then stating that he didn't see it to ascertain what kind of bottle asserting that he never returned the bad words or profanity used by the strikers toward him as he drove through the picket line contrary to Cisneros, who said that sometimes they would return the foul language and would laugh at the pickets when Cisneros said he would not laugh.

Gonzales stated that the picketers said the same things every day and after a while they found it amusing although at first he took the picketers seriously. Cisneros, according to Gonzales, would say things to the picketers, calling them names such as crazies, but denies that Cisneros ever used profanity. There were no charges filed because of this incident. The Company never interviewed any striking employees regarding any of these incidents nor have they asserted any wrongdoing related to this incident as a basis for denying reinstatement.

February 21 was also the date that Herbert Shertz asserts that his vehicle was damaged by a pipe bomb as previously discussed. According to Sheriff's Deputy Terhorst, the bomb was described as consisting of a one and three-quarter by five inch galvanized pipe with a three-quarter

inch galvanized cap screwed to each end. All that Terhorst could relate to Tom Simovich was that a pipe bomb was involved in the incident. Terhorst also gave Ed Simovich the same information concerning the incident that he gave Tom Simovich. Terhorst opined that a pipe bomb was used to create the explosion.

33. The Events oF March 7, 1980

Francisco Zamora testified that on March 7, 1980, while he and Mary Garcia were standing at 2500 Rosemead observing the pickets, they noticed Tom Simovich walking toward them carrying a cardboard box on his shoulder. As Tom Simovich passed by, Tamora asserts that he said, "Hi, Mr. Tom. How is your back?" It is then alleged that Tom Simovich stopped a couple of feet from Zamora and Garcia and said, "You will never work for me again, you little son of a bitch." Zamora claims he did not reply but that Mary Garcia told Tom Simovich that he had a dirty or a

filthy mouth, and Tom Simovich responded that Mary Garcia had a filthy mouth, called her a bitch, and stated that "you will never get a contract." At that point, Ed Simovich came toward them and asked his father to leave them alone, stating, "Please, sir, leave them alone" several times and then Tom and his son continued walking away.

Mary Garcia, in her testimony, recited a similar version of the event, claiming that Ed Simovich and Art Van Haasen were on the north side of the driveway while she and Frank Zamora were on the south side of the driveway at 2500 Rosemead when she observed Tom Simovich, Sr., coming out with a box on his shoulder and cross the driveway in between the cars that were going out the driveway. As the cars passed them, Frank Zamora said, "Hi, Mr. Tom. How is your back?" Tom replied, "Shut up, you little son of a bitch. You will never work for me

again." Garcia then claims that she said, "That's not a very nice way for a man your age to talk." Garcia states that Tom Simovich then turned around and said to her, "And you, too, you bitch, you will never get a contract from me." That was the end of the conversation for Ed Simovich came up and said, "Don't, Tom," or, "Don't, sir," something to that effect, "leave them alone," and then Ed stayed with his father until his father crossed the street. She described Zamora's inquiry as being friendly and she did not feel any personal animosity toward Tom Simovich. She did not know the man, however she did refer to him on March 7 as a dirty old man because of the way he talked. She does not believe that during the conversation after Ed walked up or otherwise that one of Tom Simovich's rejoinders was accusing her of being the one with the dirty mind. She also could not explain why he

mentioned that they would never get a contract from me to her since she had never been involved in the contract negotiations.

Tom and Ed Simovich gave a different version of the incident. Tom Simovich claimed that he was carrying a box of parts across the street when Mary Garcia approached him "with her friend Francisco 'Peanuts' Zamora and she said her usual nasty words, 'Here comes that man with the dirty, filthy mouth.'" He then asserts that Mary Garcia started to read him off "like she always does." Tom Simovich claims that he then replied that she should certainly know because she had been practicing for a long time. That was the extent of the conversation. Tom Simovich and his son Ed

stated that Ed never referred to Tom as "Sir or Dad."[87]

Tom Simovich indicated that his son, Ed, was accompanying him across the street. Ed Simovich did not make a similar claim. Although he corroborated, in almost the same verbiage, his father's version of the incident, he merely stated that he was present during the conversation and, as he

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[87] Tom Simovich gave an affidavit prior to his testimony which states:

On March 7, 1980, I was walking across Rosemead Blvd. from the 2439 to the 2500 street address and was carrying a small box about one foot square, and I was walking with my son, Ed.

Mary Garcia and Frank Zamora were standing near the middle gate, there being three gates about two or three feet away from where we were walking. Garcia said, "Here comes that dirty old man" --Garcia said, "Here comes that old man with the dirty, filthy mouth." I told Garcia that she should recognize someone with a dirty mouth, because all she had been doing was cussing employees out, including myself.

On the way back from 2500 to 2439 street address, Garcia and Zamora were where they had been. Garcia called me some obscene names and I ignored her and kept walking. Zamora did not say anything.

heard the gist of the conversation, he approached his father, sort of grabbed him, and said to keep going and they proceeded together across the street. Based on demeanor, candor and inherent consistency, the Zamora-Garcia version of the conversation is credited since they stated that Ed and Tom did not proceed together initially as Tom had claimed, but that Ed came up and took Tom away from the conversation, as Ed testified. Ed Simovich was present during his father's testimony and Zamora was present during Garcia's testimony but Garcia testified before Zamora. Based on demeanor, candor and the other factors discussed above the Garcia-Zamora versions of the event are credited.

34. The Events of March 10, 1980

Victor Paul Castonguay, an employee hired by the Company on April 6, 1977 who worked through the strike, asserts that on

March 10, as he was going home after work, he saw Joe Solis' vehicle, which he identified as a 1952 Chevy pickup, green with black fenderwalls, on Rosemead Boulevard. Solis averredly attempted three times to run him off the road by swerving his vehicle toward Castonguay's vehicle until it got to approximately one foot from Castonguay's vehicle. Castonguay told Ed Simovich about the incident the following day. Castonguay stated he habitually reported to Tom Simovich within 24 hours of any occurrence pursuant to instructions he received from Tom Simovich during a meeting a few days prior to the commencement of the strike. Castonguay did not report the incident to the police.

Bobby Charles Smith, the foreman of the mast department at Respondent, corroborated Castonguay's testimony, stating that he was departing the plant right after Richard Castonguay and saw Castonguay's

vehicle go onto Rosemead Boulevard, make a U-turn, proceed south; saw Solis proceeding south on Rosemead at a rapid speed, blowing his horn and with a passenger hanging out the window waving arms and shaking his fists and, when he got barely in front of Castonguay's pickup, he started veering toward Castonguay's vehicle so that they came within inches of one another. Smith stated he observed the event as he was waiting for traffic to clear so he could proceed out on Rosemead Boulevard and was about 30 yards away from the incident. Smith stated that Solis' vehicle was inches ahead of Castonguay's pickup truck and he believes that there would have been a collision if Castonguay had not changed lanes, it was very close to being a collision. According to Smith, Castonguay's vehicle moved toward the curb and Solis' vehicle moved toward Castonguay's simultaneously, and then Solis'

vehicle got into the same lane ahead of Castonguay's vehicle. Castonguay stopped and Solis drove on. Solis denies attempting to run Castonguay off the road.

35. The Events of March 29, 1980

According to the uncontroverted testimony of Ricky Craft, on the evening of March 29, at approximately 1 or 1:15 a.m., he was picketing with his brother-in-law, Mickey Lambright, and coworker Steve Baugh. The three strikers were sitting by a fire eating doughnuts and coffee when a van pulled up and approximately 13 people got out of the van holding clubs. Also present was Sam Munoz, who provided a guard service for Respondent, and three armed security guards.[88] The 13

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[88] Sam Munoz is the individual that told Tom Simovich that there was a contract out on his life on October 23 and he was assertedly present during the Ricky Craft incident. Sam Munoz did not testify even though he was still servicing Respondent. No reason was given for this failure to appear and testify.

individuals were all dressed similarly and did not say a word. They started after Mickey Lambright[89] who, according to Craft, was knocked to the ground and struck several times so that he had bruises all over his body and was hit on the head and injured sufficiently to require a few stitches in his head. Ricky Craft was shot in the chest and the left wrist and was hospitalized for 8 days. Craft did not recognize any of the 13 men. No one gas apprehended in the incident and there was no direct attribution to replacement employees or any connection with Respondent demonstrated in the evidence.

F. Reinstatement of Strikers

1. Termination of Strike

According to Gazzigli, around the first week of April, the Union discussed with the membership the possibility of terminating

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[89] Lambright did not appear and testify.

the strike. The discussions were held because it was becoming increasingly evident that the strike and picket lines were ineffective and because the Union had filed a number of unfair labor practice charges against the Company, which were pending. Therefore, it was determined that the better strategy at that juncture would be to make an unconditional offer to return to work, and pursue the unfair labor practice charges. This course of action was adopted and on April 17 Gazzigli sent the Company both a letter and telegram informing Respondent that the employees were going to return to work unconditionally on the morning of April 21.[90] The Company never directly replied to

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[90] The telegram stated:
The employees of Champ Corporation currently on strike unconditionally offer to return to their former positions or to substantially equivalent positions if their former positions no longer exist.
(continued...)

the telegram or letter. Ed Simovich believes the telegram was received the evening of April 17.

According to Ed Simovich, immediately after receiving the April 17 telegram he consulted with Hoy and they collaborated in the preparation of a statement that was to be handed to the employees upon their reporting to work on April 21. The missive read: "Your union has not given us reasonable time to replace you to your job or an equivalent job. We do not

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[90](...continued)
The striking employees will be reporting to work at the start of the scheduled shift on Monday morning, April 21, 1980. Should you have any questions or comments, please contact the undersigned. My office number is (213) 771-6800. Signed, Ralph Gazzigli, International Representative, sent April 17, 1980, at 6:25 pm. est.
The letter sent the same date states substantially the same as the telegram. Respondent does not contend the offer to return was not unconditional

have sufficient health and sanitation facilities to accept any major number of employees. For further instruction, please contact your union." On April 18, according to Hoy's uncontroverted testimony, Hoy spoke to Fenton, the attorney for the unions in this instant proceeding, and informed him that reinstatement of the striking employees may take more than one week.

2. The Events of April 21, 1980

At 7 am., over 50 striking employees were lined up to enter Respondent's facilities. The uncontroverted testimony indicates that Ed Simovich met the employees offering to return to work at the gate, which was designated the main entrance to Respondent's facilities, and informed them that they were to report to the personnel office which opened at 8 am. When the employees arrived at the personnel office, Ed Simovich had them sign a roster and handed

them the previously-described missive. Several employees also testified, without contradiction, that they were told that morning by Ed Simovich that they did not have the timecards ready to permit their return.[91] Approximately 51 employees signed the roster as having shown up for work that day.

On April 21, Hoy sent a mailgram to Gazzigli requesting that he furnish the names of the individuals who are "currently on strike" as stated in Gazzigli's mailgram of April 14, 1980, and his cooperation in providing this information was requested "to assure that those currently striking employees' rights to reinstatement are not abridged."

On April 25, 1980, Gazzigli sent a mailgram to Hoy which stated that the

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[91] See, for example, the testimony of Ricky Craft.

employees personally appeared at the normally scheduled shift on April 21, and were informed by Ed Simovich to report to the personnel department at 8 a.m. The employees then signed the company roster at the request of Ed Simovich. The mailgram noted that Steven Baugh and Thomas Vargas[92] appeared at 9 a.m. at the Company's premises and were informed they were too late to sign the roster. Ed Simovich, in his testimony, noted he had heard that Baugh had shown later that day and had talked to Dick Rowe, he believes.

On May 2, 1980, Gazzigli responded to Hoy's request for the list of names of the individuals who were unconditionally offering to return to work, stating that the Union asserted 54 strikers appeared and attempted

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[92] The mailgram stated the names were Steven Vaugh and Thomas Bagas. However, there is no contention that the misspellings led to any confusion as to the individuals addressed in the mailgram.

to work at Champ Corporation on Monday, April 21, and that 62 individuals, whose names and addresses were furnished as an attachment to the letter, have offered and are continuing to offer to return to work unconditionally. The list enclosed with Gazzigli's May 2 letter, which the record indicates was received by May 5, 1980, had 6 names with a designation "not aware of sign-in O/F/T." The Company, on May 5, by Ed Hoy, wrote Gazzigli and asked what the O/F/T designation indicated. This communication further stated that they agreed with the Union's position that 54 employees offered to unconditionally return to work by appearing on April 21 they were confused since 64 names were enclosed on the list submitted in the May 2 letter. Hoy's letter further noted that 4 names alluded to employees being on medical disability. They did not know of any disability and requested further explanation.

The following explanation was given as to the O/F/T designation: those are employees, according to Gazzigli, that were out of town and not available to appear on April 21 to sign the Company roster, and the medical disability statement after an employee's name is that they are under a doctor's care and were unable to report. Hoy's letter of May 5 indicated that they were developing a reinstatement process and that the information supplied on May 2 naming the emloyees unconditionally offering to return to work would assist in that process.

According to Ed Simovich, between April 17 and May 5 the Company formalized a reinstatement program. The program was designed to consider three major factors. The first factor, according to Ed Simovich, was that in light of the violence that occurred during the strike, reinstatement was to be effectuated in a manner that would

optimize plant safety and avoid a riot or an outbreak of violence at the plant. Therefore, a massive reinstatement was determined to be too dangerous. The second major concern, according to Ed Simovich, was the ensuring of product safety since they experienced some sabotage to products before and during the strike. They wanted to avoid any difficulties with quality control. The Company did not want to increase its already large premium for product liability insurance. Also, the Company wanted to protect its reputation for fine workmanship. The third consideration the Company factored into its plan was that economic conditions had significantly worsened by May 1981 lessening demand for employees. Therefore, according to Ed Simovich's unsubstantiated testimony, he met with the foremen of the different areas to discuss the problem as

well as with Hoy, Tom Simovich and Arvilla Shooter.[93]

3. The Reinstatement Plan

After the previously described consultations, the Company grouped the strikers into four major categories. The categories were initially predicated on the 54 names the Company determined returned to work on April 21. In addition to the 51 individuals who signed the roster as being interested in coming to work, they determined that Steve Baugh, Thomas Vargas and Jesus Moreno also demonstrated sufficient interest to be grouped with the 51 individuals who signed the roster. The other 10 persons comprised the first group which was designated as the strikers who did not

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[93] Hoy and Tom Simovich did not substantiate to any substantial degree Ed Simovich's testimony in this regard and Arvilla Shooter did not testify.

show up to work on April 21.[94] The Company decided to process the 54 employees who signed the register or otherwise were deemed as demonstrating an interest on April 21 of returning to work and, after those 54 employees were processed, they would pursue the 10 additional employees.

The second group of employees that Ed Simovich arranged were those he deemed to be permanently replaced prior to November 4, 1979. According to Ed Simovich, the individuals who fell into this category are Antonio Andrade, Alejandro Arroyo, Javier Arroyo, David Coronado, Ricky Craft, Enrique Figueroa, Lorenzo Franco, Mickey Lambright,

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[94] These individuals were Manual Avalos, Vincente Banaga, Raul Cortez, Marvin Cummings, Oscar Guerrero, Calvin Hassler, David Hassler, Dexter Kerr, Ronald Kerr and Randolph Montoya.

Francisco Zamora and Martiniano Rodriguez.[95]

The third category he devised included four individuals who were placed on layoff status. These four individuals were Gonzalo Andrade, Manuel Garay, Javier Lopez and Jose Reyes. The fourth category were those individuals against whom the district attorney had lodged criminal charges. Although 14 individuals were named, possibly 15, by the Sheriff's Department, 13 individuals were placed on this list. They are Carlos Almaroz, Ernesto Arroyo, Alberto Cortez, Ruben Gutierrez, Cesar Moran, Javier Olague, Eduardo Ortiz, Jose Padilla, Ramon Rodriguez, Martiniano Rodriguez, Joe Solis, Heriberto Valenzuela and Jose Villavicencio. Vincente Banaga also had criminal charges

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[95] The list, as originally compiled by Ed Simovich, included the name Jesus Valdez but during his testimony he admitted Valdez's inclusion in this category was a mistake and that he should have included Martiniano Rodriguez.

against him but they decided he would not be included in that category. The basis for this decision was not placed in evidence.

4. The Reinstatement of Employees Who Did Not Appear On April 21

Without any explanation as to what occurred between the development of the reinstatement plan and the first communication with the 10 individuals designated as not asserting an interest in returning to work on April 21, the Company first communicated with these individuals by letter dated June 27. The same letter, contextually, was sent to all 10 individuals. The letter states:

> Your union sent to us a mailgram on 4/17/80, stating that the current striking employees offered to return to work unconditionally. Your name appeared on the list, supplied to us by the union on 5/9/80, that identified you

as a striking employee. As of today, we have not heard from you in any manner. Please notify us of your intentions. Contact the office and ask for Ed Simovich. Phone _____. Signed, Tom Simovich.[96]

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[96] Ed Simovich stated that he did not know why the Union indicated these individuals had a desire to return to work as of April 21. However, as previously indicated, the Union did send a letter to the Company on April 17 offering unconditionally a return to work on behalf of all employees currently on strike and, on May 2, sent Hoy a list of individuals including these 10 persons, stating Vincente Banaga was not aware of sign-in procedure, he was out of town; that the same was true of Raul Cortez, Calvin Hassler, David Hassler, Randolph Montoya and Jesus Moreno. The list forwarded to Hoy also stated that the following individuals were on medical disability: Marvin Cummings, Dexter Kerr1 Ronald Kerr and Pedro Lopez. When Respondent indicated some confusion as to the letters O/F/T, Gazzigli informed the Company, by mailgram dated May 9, 1980, that the designation was for "out of town" and not available to appear on April 21 to sign the Company roster. Therefore, Ed Simovich's statement that he did not know why these individuals were included on the Union's list is not credited. This is particularly true

(continued...)

There was no indication as to why the Company waited until June 27 to inquire of these employees regarding their intentions of returning to work.

One of the individuals included in this group by Ed Simovich, et al., was Marvin Cummings. Cummings was initially hired by Champ Corporation on March 24, 1975 as a general mechanic. Cummings continued working solely as a general mechanic until about July 23, 1979 when he was disabled and had to have an operation. After the operation, he continued to be disabled until January 15, 1980 when the disability terminated. The disability was related to a hip injury he sustained during World War II. He stated he advised the Company that he was no longer disabled, specifically informing Phyllis Lund

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[96](...continued)
where the O/F/T designation was preceded clearly by the statement, "Was not aware of sign-in."

who was the individual he always called at Respondent's facility. He never supplied a written doctor's release to the company regarding this particular disability. The Company, by letter of December 12, 1980, inquired about his disability. This was the first correspondence and inquiry the Company made regarding his disability. He discussed the matter with Arvilla Shooter, he asserts, personally delivering a release form which the Company made a copy of and placed in his file.

According to Cummings, he went to the Company on April 21, 1980, but failed to see anyone he could talk to early in the morning when he made his initial appearance. Since he had been summoned for jury duty with the Superior Court of the City and County of Los Angeles on that date, he left the vicinity of Champ Corporation and reported for jury duty. He served on jury duty for a

little more than 2 weeks, he believes. Prior to going on jury duty, Cummings asserts that he informed the Company that he was going to be unavailable on April 21 because of jury duty. The conversation arose in response to a request from the unemployment office to contact the Company to ascertain if there was any work available that was unrelated to the labor dispute. During that conversation, he was informed that there were two openings in his department but they were still on strike. He then told Phyllis Lund that he was going on jury duty April 21. When he completed jury duty, he again telephoned the Company and spoke to Phyllis Lund and was informed, after stating he was available to work, that nothing was currently available. Cummings did not get any other communications from the Company until the letter dated June 27. He received the June 27 letter in July because he moved on June 1 and the letter was mailed

to his old address. After receipt of the June 27 letter, he went to Champ Corporation and talked to Phyllis Lund. She arranged for him to talk to Ed Simovich on the telephone in her office. Ed Simovich told him at the present time they didn't have anything they could offer him.

On October 22, 1980, Cummings received a letter bearing the signature of Tom Simovich which stated that he had earned vacation from March 4, 1979 through March 24, 1980 and specified the amount, a check for which was included as an attachment to the letter. The letter closed with a statement as follows: "We would appreciate your telephoning Mrs. Arvilla Shooter regarding your current status." He telephoned Arvilla Shooter after receipt of this letter on or about the first of November. He claims Arvilla Shooter informed him that some old customers were returning to the Company for

service and business appeared to be picking up and there might be a position for him soon, that she would check to ascertain if he could come back to work. Arvilla Shooter assertedly inquired if he wanted to leave his profit-sharing intact or withdraw it. He informed her he would like to leave it intact since he still considered himself an employee of the Company. Also sometime in November, Cummings went to the office and personally took a copy to Mrs. Shooter of a release form he received from the Veterans' Hospital regarding a disability he suffered in August of 1980.[97] He was disabled from August 26 until, he believes October 20.

In March of 1980, Cummings applied for unemployment benefits. In November of 1980, the employment agency sent him to the

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[97] The August disability was due to accident resulting in a severely broken nose which required "reconstruction surgery."

Pacific Personnel Services Agency for work referral. He spoke to a woman named Pat; he does not recall her last name.[98] Pat informed Cummings that there was a job opening at Champ Corporation in his work classification. After completing the paperwork Pat gave him, she did not send him anywhere but suggested that he check with Shooter to ascertain if the job at Champ was still available. She was surprised that he worked at Champ and that there was a job order for a mechanic.

After this meeting with Pat, Cummings went to Champ Corporation to see Shooter. No one else was present. Cummings related to Shooter what occurred at the

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[98] It is recognized that the testimony regarding the events at the employment agency are hearsay. In recognition of the existence of records in the possession of Respondent indicating the truthfulness of the assertions which were not introduced into evidence, this testimony will be considered although its weight will be somewhat diminished.

personnel office but she did not say whether the job was still available. Shooter talked to Ed Simovich to see if there was an opening in the service department at the time and she related that Ed said there was nothing currently available and a job would not be available until the new year. The conversation cccurred around November 20, 1980.

On December 12, 1980, in apparent corroboration of Cummings' testimony, he received the following letter over the signature of Arvilla Shooter:

> We have received your physician's notice dated 10/29/80 giving you a full medical release to return to work without any restrictions. Our records show that you left work during your scheduled work shift on October 12, 1971 with an illness for which you later filed a State disability claim.

During the time period of your disability, the company was unable to hold your work assignment open for your return, due to existing service work requirements. At present, there are no available openings in the department where you worked and no other available work assignments for which you are qualified. We are, therefore, placing you on layoff until that time when an opening for which you are qualified develops. Please contact the personnel department if you have questions regarding your recall rights.

You may have unemployment rights and we encourage you to contact the California Employment Development Department on this matter.

There was no statement as to who permanently replaced Cummings and to date he has not received an offer of reinstatement. There

was no explanation as to why Respondent switched Cummings' classification.

Another striker in this category, Manuel Oscar Avalos, stated that the first time he was notified he could return to work at Champ was when he received a telegram from the Company. Avalos received the telegram sent by the Company on July 10, 1980, which stated they accepted his unconditional offer to return to work and stated he was to return to work at 7:15 a.m. Monday, July 14.[99]

Subsequent to the receipt of the telegram, Avalos went to the offices of Respondent, talked to Ed Simovich and discussed salary. According to Ed Simovich, Avalos indicated that he was not going to leave his other job and would not return to Champ. The conversation occurred, according to Ed Simovich, on or about July 11, the

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[99] The same telegram was also sent to Raul Cortez, Oscar Guerrero, David Hassler.

Friday prior to the Monday he was informed to report to work. Avalos admitted that he decided not to return as an employee of Respondent. On July 17, 1980, Respondent, over the signature of Tom Simovich, the general manager, sent Avalos a letter stating that he voluntarily terminated his employment with Champ Corporation, that the payroll department would be so notified and would be forwarding all monies due and owing to him.

Vincente Inez Gonzalez Banaga,[100] to whom a telegram was sent on July 16 requesting him to report to work on July 18, reported for work on the specified date. No

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[100] As previously noted, Banaga was arrested for obstructing a driveway and breaking a window in a Toyota. Of these two arrests, the charge of obstructing an intersection was dismissed and he was placed on probation for one year for the offense of breaking the window of the Toyota on October 21, 1979. Also, as previously indicated, there was no explanation given by Respondent as to why Banaga was treated differently than the other individuals who were arrested and charged with crimes during the strike.

one from the Company mentioned the fact that he was arrested. After talking to Ed Simovich, Banaga was sent to talk to Dick Rowe pursuant to the plan established by Simovich for the reinstatement of workers.

Banaga worked for the Company for 1 week and 2 days. When Banaga commenced employment on July 18, he experienced difficulties with his coworkers. Banaga worked in the paint department and he considered Ernesto Lopez as the supervisor in charge of the painting area. On the morning of July 18, his coworkers threw about four objects at him. He was not struck by any of the objects. During the afternoon no objects were thrown at him. Tuesday morning, two or three objects were thrown at him; none struck him. Again in the afternoon nothing was thrown at him. A similar pattern persisted through the remainder of the week with several objects being thrown at him in the

morning and none in the afternoon. He was not struck by any of the objects. The following week on Monday and Tuesday, the same pattern prevailed. He was not struck by any of the objects that were thrown at him. The objects were pieces of metal which were wrapped in rags or tape. The objects were approximately the size of a baseball.

Pursuant to instructions that he had received from Ed Simovich, he informed Nestor Lopez of the problems he was experiencing. The conversation occurred on Tuesday, July 19, the day after he returned to work. Lopez acted as a translator for him with Ed Simovich. According to Banaga, Lopez was present at times when the objects were thrown at him. Whenever one of the objects hit any metal or other structure or it bounced off and was noticeable, according to Banaga, Lopez would laugh. Banaga observed Nestor Lopez laughing at the incidents two or

three times or on two or three occasions.[101] Banaga could not discern who was responsible for throwing the objects at him.

Banaga discussed the matter with Nestor Lopez. Lopez indicated that there were going to have to be layoffs and that he did not want the individuals who were currently working for him and who worked for him during the strike to be thrown out of

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[101] According to Banaga, these incidents were not related to Counsel for General Counsel at the time that affidavits were taken in preparation for this proceeding. The reason for this failure is unexplained. The issue arose only during a conversation fairly close to the commencement of this trial when Banaga was speaking with Frank Zamora. After the issue was raised, Zamora and Banaga consulted with Counsel for General Counsel. This omission from Banaga's affidavit does not discredit his testimony for there was no showing that any question of constructive discharge was being investigated by General Counsel at the time Banaga gave his affidavit. It is also noted that Counsel for General Counsel specifically stated that the issue of constructive discharge was not included in the matters raised by General Counsel's office in this proceeding.

work. Lopez indicated to Banaga he wished to prevent the reinstatement of strikers and, because the individuals who were then working for Champ were afraid they would lose their jobs if the strikers were reinstated, they harassed the returning strikers. Banaga indicated to Lopez that he was frightened, that he did not want anyone to hit or hurt him. Lopez then informed Banaga that if he did not want any problems at Champ he should go home. At that point in the conversation, Banaga requested Lopez speak to Ed Simovich. Lopez left the area and when he returned he told Banaga, "You can go, or you can leave, and tomorrow don't come back." This was the last day that Banaga worked at the Company.

Banaga did not speak directly to Ed Simovich after the Lopez conversation. Earlier that day, Ed Simovich went to tell Lopez that whenever Banaga had a problem, Banaga was to report it to Lopez so that

Lopez could go tell Ed Simovich about the problem. According to Banaga, "Mr. Ernesto Lopez told me leave, that he had already spoken with Edwardo Simovich. But what I never really knew was if he truly, really ever spoke with him or not. The only thing I know is that he told me to leave and for me not to return the following day. That was all."

Counsel for General Counsel specifically stated at hearing that the evidence regarding harassment of returning strikers was introduced into evidence solely on the issue of motive and was not to be considered dispositive of any question of constructive discharge. Based on this representation, the issue regarding harassment of returning strikers will not be considered with respect to any allegation of constructive discharge because Respondent has relied on this representation. The

specificity of the representation by Counsel for General Counsel precludes me from finding that any issues regarding constructive discharge were fully and fairly tried. This finding that the issues relating to constructive discharge were not fully and fairly tried further precludes a finding on the merits as urged by counsel for Charging Party, that the striking employees who were harassed upon their return were in fact constructively discharged.

Ed Simovich indicated that after Banaga worked 9 or 10 days, he learned from his leadman, Ernesto Lopez, that Banaga had left the premises. Banaga was terminated August 4, 1980 and was notified of his termination on August 4 and August 13, 1980 on the basis of failing to show up for work for 4 consecutive work days without reporting or giving any excuses for his failure to report for work. He was given an opportunity

to respond to this inquiry, failed to do so, hence a letter of termination was sent to him. Accordingly, if any remedy is applicable to Banaga, such entitlement to remedy terminated on August 4, 1980.

Raul Cortez was sent an offer of reinstatement dated July 10, 1980. Cortez did not report to the Company. On July 17, 1980, Tom Simovich signed a letter addressed to Raul Cortez which stated that "You voluntarily terminated your employment with Champ Corporation. The payroll department will be so notified and they will be forwarding to you all monies due to you." Cortez did not appear and testify. No explanation was given for this failure. Accordingly, the uncontroverted evidence of Respondent warrants a finding that Cortez terminated, voluntarily, his employment with the Respondent as of July 17, 1980. Oscar Guerrero did report to the Company on July

14, 1980, was reinstated and continues to work for the Company.

After Respondent sent to Calvin Hassler the letter of June 27, 1980 requesting notification of intentions of those individuals who hadn't appeared on April 21, the Company sent him a mailgram accepting his unconditional offer to work and informing him he was to report at 7:15 am., July 14, 1980. There was no response to the telegram. Consequently, on July 17, 1980, the Company sent to Calvin Hassler a letter stating that they considered him to have voluntarily terminated his employment with Champ Corporation. According to Ed Simovich, similar events obtained with regard to David Hassler. Based on this uncontroverted testimony, both Calvin and David Hassler, who failed to testify, are found to have voluntarily terminated their employment with Respondent as of July 17, 1980.

Dexter Kerr, according to Ed Simovich, last worked for the Company in June of 1979 when he suffered a non-work related injury, a separated shoulder, had an operation to correct the separation and was disabled. Ed Simovich asserts that he was replaced by the Company in or around the middle of August 1979 by John Crunkleton. On June 27, 1980, a letter was mailed to Kerr inquiring if he was interested in returning to work. The Respondent received a letter from a John G. Colias, M.D., which informed him that Dexter Kerr may return to work on July 21, 1980 without limitations. Crunkleton left the employ of the Company on October 19, 1979, and was replaced by Don Quick in January of 1980. Quick is no longer employed by Respondent and was not replaced by anyone according to Ed Simovich. Dexter Kerr did not appear and testify. There is no showing by Respondent that it accepted the

unconditional offer to return to work made on behalf of Dexter Kerr. However, General Counsel also failed to show that Kerr's absence was attributable to his participation in the strike and that he was properly included in the Union's offer to return to work. Accordingly, it is found that Counsel General Counsel has failed to establish Dexter Kerr's entitlement to reinstatement and, hence, all allegations regarding Kerr in the complaint should be dismissed.

Ronald Kerr, who also did not testify, was sent the June 27, 1980 letter inquiring if he was interested in returning to work. Ronald Kerr was then sent a telegram on July 10, 1980 which stated that his unconditional offer to return to work was accepted and informing him he was to return to work to Mr. Dick Rowe, in the production office, on Monday, July 14, 1980. Subsequently, at an unspecified date, Ronald

Kerr telephoned and was informed that he was being called back to Respondent to be put on layoff. Respondent explained that Ernie Phillips and Mark Hammerdinger were hired to work in the chassis department in place of Ronald Kerr because Herbert Sherts, the foreman, and Jose Albarran, the leadman, determined that Ronald Kerr did not have the necessary skills for the position in that department. These replacements were hired after July 1980. According to Ed Simovich, they were going to hire individuals with very specific kills as opposed to Ronald Kerr who had performed only general assembly work in that area of the corporation. Phillips had been a mechanic for 13 years and was hired to perform brake assembly, brake adjustment, brake installation and repair which was a job the corporation had had performed for a number of years by an employee who was

retiring.[102] Hammerdinger, according to Respondent, had more mechanical experience and schooling than Ronald Kerr; Hammerdinger could troubleshoot and perform jobs that were not repetitive in nature including tasks that required a measure of diagnostic skills. Respondent had an employee in the assembly department who was 70 years old and couldn't perform fulltime work anymore. Hammerdinger was to perform those functions and also he went to diesel scbool to become a diesel mechanic. Champ was putting in more diesel models.[103] To date there was no indication

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[102] Since there was an employee who was retiring being replaced by Phillips, could Phillips reasonably be considered a replacement for Ronald Kerr is a question that was left unanswered by Respondent.

[103] Inasmuch as the unnamed 70-year old employee who was working partime was, at least, partially replaced by Hammerdinger, the question of whether Hammerdinger was hired to replace R. Kerr is again not fully explicated on the record. Therefore, it is found that this assertion is a pretext to mask discriminatory motives.

that Ronald Kerr was ever offered reinstatement.

Randolph Montoya, according to Ed Simovich, did not participate in the strike to his knowledge. He was on the payroll on October 28, 1979, working for Champ.[104] In the middle of November 1979, Ed Simovich asserts that he had a conversation with Montoya in the parts department. Montoya assertedly had come to the premises to pick up his personal belongings. In the presence of Larson, as Montoya was leaving the department with a radio, he stated that he was departing and not coming back. Ed Simovich inquired if he was quitting, and Montoya said he was leaving. Montoya then talked to Larry Larson on his way out and then left. Montoya did not come to the

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[104] No Company documents were proffered in support of this assertion.

Company on April 21, 1980, and on December 10, 1979, prior to the termination of the strike, Respondent wrote a letter to Montoya stating:

> It is our understanding that you told Larry Larson, the parts department manager,[105] that you were not going to work here anymore, as of 11-28-79.
>
> The enclosed check represents your pro-rated vacation from the first of an. 1979 through your date of termination. You had already been paid for your one week's vacation based on the year 1978.

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[105] It is observed that Respondent, in this letter prior to the termination of the strike and prior to the first of January when Respondent asserts it reorganized its personnel, designated Larry Larson a manager. This reference supports the finding hereinabove that Larson is in fact a supervisor as defined in the Act, and discredits Respondent's claims that only after the reorganization did some of its employees accede to supervisory status.

If there are any questions, please call me.

This letter, which contained a check in the sum of $153.66, was signed by Arvilla Shooter. Montoya did not appear and testify. There was no explanation for his absence. Accordingly, the uncontroverted testimony of Respondent is credited, and he is found to have voluntarily terminated his employment as of November 28, 1979.

5. Employees On Layoff

These employees, Gonzalo Andrade, Manuel Garay, Javier Lopez and Jose Reyes, along with all the other employees who had reported as being available for work on April 21, received a telegram on or about May 28, 1980, stating, "We accept your unconditional offer to return to work and you are to report into Mr. Ed Simovich at the personnel office (2439 Rosemead) on Friday, May 30, 1980 at ___p.m."

According to Ed Simovich, the four individuals placed in this category were replaced by employees[106] prior to April 17, and these replacement employees were laid off. The layoffs occurred sometime in the beginning of May. Because these strikers' replacements were laid off, the strikers were placed on layoff status. Consonant with this decision, Ed Simovich gave these four strikers a letter on May 30 which stated:

> You are being called back to the active Payroll of the company and you are laid off for lack of work. Had you been working here at this time, you would still be laid off for lack of work. You have not been replaced.

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[106] It is asserted that Andrade us replaced by Frank Edwards; Garay was replaced by Joe Pinzon; Javier Lopez was replaced by Al Scoma; and, Jose Reyes was replaced by Martin Gonick.

The company's policy regarding your right to recall from layoff is as follows:

1. If you have worked twelve (12) continuous months or more for the company from your last data or hire, your right to recall shall exist up to twelve (12) continuous months of layoff from date of layoff.

2. If you have worked less than twelve (12) continuous months for the company from your last date of hire, your recall rights will be equal to the number of continuous months actually worked.

Subsequently, on November 19, 1980, Arvilla Shooter sent a similar letter to the four individuals placed in this category, which stated:

This letter is intended to clear up any misunderstandings that may exist regarding your economic layoff from

> Champ Corporation. At present, there are no available job openings in the department where you worked and no other available work assignments for which you are qualified. You have been placed on layoff, as you were originally notified on May 30, 1980, until that time when an opening for which you are qualified develops. No limitations have been placed on the time duration of your recall rights.

The was no indication that any of these four individuals were ever recalled to work.

6. Permanently Replaced Strikers

As previously indicated, Ed Simovich placed 10 strikers in the the category of being permanently replaced prior to November 4, 1979. Originally he named Jesus Valdez as being within this category but, upon reflection, realized that this placement was a mistake, that Jesus Valdez

was not permanently replaced on or before November 4, 1979. Instead, Martiniano Rodriguez had been replaced by November 4, 1979.

Ed Simovich defined this classification as encompassing those strikers who were replaced by an individual who was hired as a permanent employee of Respondent prior to November 4, 1979. The date of November 4, 1979 was chosen pursuant to the advice Simovich received from Hoy that the date had significance because of the allegations of Counsel for General Counsel. The determination that a certain employee permanently replaced a striker was made by Ed Simovich who determined if the work the replacement employee was doing was the same as that previously done by the striker. The determination, he stated, was based on a variety of reasons, sometimes involving working on the same machine or doing the same

job as the striker. The status within the four categories of the strikers was changed by adding some to the layoff list as seen in the discussion of the first category involving employees who did not appear at the Company on April 21.

During the course of determining reinstatement, strikers were placed on layoff from another category if it was determined that the individuals who replaced them were laid off because of lack of work. Ed Simovich asserts no striker was initially placed on layoff solely because of lack of work, only because the individuals that replaced them were laid off.[107] The determination of who was to be laid off was based solely on need, what jobs the individuals were performing and which ones

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[107] It is asserted that the Company never laid off on the basis of seniority prior to or during the strike.

were needed to continue the operations of the plant consistent with orders for merchandise and other economic circumstances.

Ed Simovich avers that the employees who were designated as permanently replaced were put on a preferential hiring list; when a job which they had performed prior to the strike became available, and there was a need for individual to perform that job, permanently, they would notify an employee within this group and offer them the opportunity to return to work.[108] The Company reserved the right to change the requirements needed

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[108] This testimony was somewhat modified when Ed Simovich stated that this practice was followed as a general rule if it was determined that the striker could do the work, could do all that was required on the job; then they would offer the position to that striker. Therefore, it is found that the Company did not have a clear, well-defined method of reinstating the employees in this, as well as the other, categories.

for a position as it came open and did not feel, necessarily, an obligation to offer a job to a former employee if they determined the employee did not have the skill to perform that job. The Company reserved unto itself the right to fill jobs with individuals who had different qualifications than someone who had gone out on strike. Ed Simovich testified that this modus operandi was consistent with his statement in an affidavit given on September 8, 1980, which asserted that the Company, whenever an opening in the work occurred, offered a job to the employee that was formerly doing that work or consider that employee to fill the vacancy before a stranger off the street would be considered for the job.[109]

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[109] No inconsistency is found based on the statement that they would consider the employee to fill the vacancy, indicating that there was a potential that they would evaluate that striker's abilities or other (continued...)

As previously indicated, this classification of employees was also requested to report to Respondent's premises on May 30, 1980. When the individuals so classified did report, they were given a letter signed by Tom Simovich, general manager, which stated: "All records classify you as an economic striker, who has been permanently replaced on or before November 3, 1979.[110] At present, we have no other job openings for which you qualify. You are, therefore, on layoff status and we will place your name on a preferential hiring list at

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[109](...continued)
unnamed factors to determine if they wanted to maintain the same skill level before deciding if they wanted to modify the job description or the skills required of the individual filling the job.

[110] Note that the date specified in the letter differs from the date Ed Simovich gave as the time he discerned that they were permanently replaced, November 4, 1979.

your request, which must be received by the company, in writing, no later than June 6, 1980. Attached is a stamped and preaddressed envelope including a preferential hiring form, marked to the attention of Ed Simovich, to be used for mailing your request to the company." The preferential hiring form was merely a statement that the signatory to the form wished to have their name placed on a preferential hiring list. According to Tom Simovich, no one returned the form stating they wished to be placed on the preferential hiring list. Ed Simovich testified that in his opinion the replaced strikers did not have to sign and return the form to Champ Corporation in order to be placed on a preferential hiring list.

Also during the May 30 meeting, it is the uncontroverted testimony of Francisco Zamora that he asked Ed Simovich if signing the form would result in the loss of his 11

years seniority. Ed Simovich assertedly replied that he could not respond to the question at that time. It is noted that the choice of November 3, 1979 as the date used to determine if a stiker had been permanently replaced coincides with the date selected by Respondent as the return date for the employees in its solicitation of their return in the letter of October 30, 1979. As previously indicated, the letter, signed by Tom Simovich, states: "We have been waiting patiently for you to return to your job and we shall continue to do so until Friday morning, November 2, at 8 a.m." They then promised that if strikers reported by Friday morning, November 2, at 8 a.m., "you will be put to work immediately." Witnesses for Respondent indicated they were going to honor that letter in the event that the individual strikers returned to work. Accordingly, Respondent, through Ed Simovich, testified

that up to November 2, 1979, the striking employees were not going to be considered as permanently replaced if they returned to work on that date.

Respondent, without any request and apparently on its own initiative, sent to these 10 assertedly replaced employees, their accrued vacation pay. Furthermore, pursuant to a recommendation by Hoy, based on some conversations he had with an employee of the Bank of America, the Company notified the six employees who had vested interests in the Company's profit-sharing plan that their accrued profit-sharing benefits would also be sent to them. As explained in the letter, the basis for this action is:

> As of this date, we have not received your request to place your name on the company's preferential hiring list. We discussed this matter with you on May 30, 1980, and gave you a

preferential hiring form with a stamped and pre-addressed envelope for mailing directly to the company. We desire to know whether or not you desire to be included on the preferential hiring list so that we do not overlook you should we need additional help in the future. If you desire to be included on the preferential hiring list, we must have your request within the next several days or so, unless there is an extenuating circumstance beyond your reasonable control.

As previously indicated, Ed Simovich, in his testimony, admitted that the submission of the form was not necessary to be placed on the preferential hiring list and that no employees returned the form. Respondent failed to advance any reason for requesting submission of a signed form as a

condition precedent to placing the addresses on the preferential hiring list.

Respondent, on June 18, mailed a letter to the six employees it determined had vested interests in profit-sharing plan that the amount of money they had in their profit-sharing plan. These employees were Zamora, J. Arroyo, Figueroa, A. Andrade, Valdez and Coronado. On or about June 26, Fenton wrote Hoy inquiring which employees received their profit-sharing interests and why the profit-sharing interests were disbursed. Hoy responded to Fenton's letter on or about August 14, stating:

> We have delayed our answer to your letter requesting names of employees who have received checks representing their "vested interest in the Champ Corporation profit-sharing plan" because it takes many weeks for the trustee to process the checks, and at the time of

your letter very few checks had been issued.

As of this date, the following individuals have received their checks as a result of their termination of employment with the company. They and any other employees terminating their employment from the company will not have any continued participation in the Champ Corporation profit-sharing plan.

Manuel Avalos	Martiniano Rodriguez
Filiberto Ruiz	Francisco Zamora
Jesus Valdez	Enrique Figueroa
David Coronado	Antonio Andrade
Javier Arroyo	Ernesto Cortez

Erasuro [sic] Salazar

Mr. Steve Baugh has terminated his employment with the corporation but as of this date his check is in process through the trustee as is Mr. [Vecente] Banaga's.

The Champ Corporation makes the full contribution to the profit-sharing plan. No employees may make any contribution to the plan.

Subsequently, Ed Simovich states that Hoy called and informed Respondent that the National Labor Relations Board's Office of General Counsel considered the letters disbursing the profit-sharing plan vested interests as letters of termination. Therefore, the Company sent letters, dated September 5, which notified these six employees who had been issued their profit-sharing benefits that there was some confusion about the matter and requested that they return the checks. Respondent denies that the letters could be construed as termination letters because they did not follow the form established by the corporation which requires that all termination letters include the basis for

such action and encloses all monies accrued.[111] All the employees sent these checks on Respondent's initiative returned the monies and they are still considered participants in the profit-sharing plan with the exception of Coronado according to Francisco Zamora.

According to Ed Simovich, Andrade was replaced by Rogilio Rivera, Alejandro Arroyo was replaced by Ray Hoyle, Javier Arroyo was replaced by Alfredo Cisneros, David Coronado was replaced by Billy Abernathy, Ricky Craft was replaced by David Herrera, Figueroa was replaced by Juan Almos, Lorenzo Franco was replaced by Perry Acosta, Mickey Lambright was replaced by Mark Case, Martiniano Rodriguez was permanently replaced

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[111] In order for the Company's profit-sharing plan to vest, Ed Simovich believes that the employee must work for the Company for 3 years.

by Gabriel Perez, and Francisco Zamora was permanently replaced by Clarence Conaway.[112]

According to Jesus Valdez's uncontroverted testimony, the first communication he received from the Company after the May 30, 1980 meeting was when he received a telephone call at his home from Ed Simovich on or about August 5, 1980. Ed Simovich inquired if Valdez was currently working or if he was interested that there

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[112] With regard to Jesus Valdez, in addition to admitting that he was inadvertently placed on the permanently replaced strikers list, Ed Simovich stated that he was originally replaced by John Moya, but he does not know when Moya was hired. Prior to Moya's hiring, an individual by the name of Arthur Barrego assumed Jesus Valdez's job duties but was deemed incompetent and was replaced by Moya. Moya was also assigned the task of leadman in addition to doing Valdez's job. Moya is currently not working for Champ, he does not know the exact date Moya left Champ but it was shortly before Valdez was asked to return to work, somewhere around July 15, 1980.

was an opening for him at Champ doing the same job he had done prior to the strike. Valdez indicated that he wanted to work and Ed Simovich asked if he could be there the following day at 8 a.m. Valdez responded in the affirmatIve. On the following day, August 6, Valdez went to the Company and talked to Ed Simovich and Phyllis Lund at about 8 a.m. Ed Simovich stated that he was going to start Valdez as a new employee, inquired if he had received a letter stating that he had been replaced, and also asked if he received his profit-sharing check. Valdez replied yes to these inquiries. Ed Simovich then stated that he wanted Valdez to execute some papers and wanted to read the rules of the Company. For example, he wanted him to

complete a new employee application and to get a physical from the doctor.[113]

Valdez inquired if he could take the documents home band return them the following day. Ed Simovich indicated that he

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[113] Ed Simovich testified that when they were hiring the permanent replacements for the strikers during the strike, they required all employees to execute these documents and to get a physical examination. However, most of the employees hired during the strike that testified at trial did not receive a directive to get a physical and had not received a physical. Another discrepancy between the asserted method of hiring replacements, is that Ed Simovich stated that they generally tested the replacements to ascertain if they met the requisite skill level to perform the job, and the replacements who testified stated that after a short interview they were immmediately hired without the medical examination and without a test of their skill levels. In fact, several of these replacement employees testified that they were currently being trained by Champ Corporation, that they did not have the requisite skill level when hired, and were not tested prior to being hired. Based on demeanor, inherent probabilities and the fact that several of these witnesses were current employees of the Company, their testimony is credited, and Ed Simovich's testimony is not credited.

would permit Valdez to take that course of action. When Valdez got home, he did take a physical and showed the papers to Francisco Zamora. Zamora prepared a document for Valdez's signature stating "I am signing company policy forms and regulations. But I do not consider myself as a new employee." Valdez executed the document. When he returned to the Company on August 7 at 8 a.m., he gave Ed Simovich the documents including the form prepared by Zamora. Ed Simovich leafed through the documents, saw the declaration that he did not consider himself a new employee, said "that's what I was looking for" and wrote a note, gave it to a telephone operator or receptionist to have it typed and handed it to Valdez to sign. Valdez asked Ed Simovich, pursuant to Ed Simovich's suggestion, if he could talk to Francisco Zamora on the telephone because the document Ed had prepared stated that as a

condition to employment he considered himself a new employee. Valdez told Ed Simovich that he would return to work if he did not have to sign the paper. He was not permitted to return to work on that basis. Valdez then said he was sorry, he would not work under those circumstances, and left the premises. He left all the documents with Ed Simovich.

On or about September 7, he received another telephone call from Ed Simovich who stated the Company was going to take into consideration his seniority from the year 1975, which took into account a hiatus in employment since Valdez commenced his employment with Respondent in 1972. Valdez agreed to the computation of seniority from 1975 and asked if he had to sign any papers, to which Ed Simovich replied in the negative. Valdez went to work the following day, September 10. He did not talk to anyone, just punched in and commenced his

reemployment. He works in an area where he is by himself. He did not experience any difficulties from Ernesto Lopez or Arturo Nieblas, nor Freddie Vallejos. Valdez's substantially unrefuted testimony is credited.

Ed Simovich indicated that because Valdez "slipped in" the document which stated he did not want to be considered a new hire, he felt Valdez could not be trusted. Ed Simovich took the position that since Valdez was given a notice of termination on May 30, 1980 as confirmed by a letter dated June 10, 1980 and he received his backpay, that he was considered a new hire on August 6. There was no explanation as to why he was eventually reinstated Valdez and felt him to be trustworthy in September.

With respect to Valdez, Ed Simovich was shown his affidavit which stated that on May 30, Valdez and other economic strikers

came in and were told they were economic strikers and would be placed on a preferential hiring list. Ed Simovich also gave them each a form to mail back if they wished to be considered for an opening. Ed Simovich then asserted on the same page of the affidavit that on June 10 a letter was sent to Valdez with reference to those who failed to send in the form stating that they wished to be placed on the preferential hiring list. The affidavit asserts that the purpose of the June 10, 1980 letter was to inform the employee of their preferential hiring rights, that they had been replaced and, therefore, were eligible for unemployment compensation. Then, the affidavit goes on to state that Valdez was given his notice of termination on May 30 and a letter of June 10, 1980 was to confirm the termination. When examined about the affidavit, Ed Simovich stated that it was an

inconsistency, that he was unhappy about it and that he had called the Counsel for General Counsel stating that he wished to have someone take another affidavit because he considered portions of the affidavit were contradictory. The affidavit was signed September 3, 1980. On September 8, 1980, be tried to clarify the matters he deemed to be inconsistent or contradictory. He admitted that after the first affidavit was taken, he reread portions of it that he felt were contradictory. Since he admitted that he reread the affidavit after the Board agent departed, it is found that he read it prior to affixing his signature to the September 3 affidavit and that his disavowal is not credible.

Martiniano Rodriguez,[114] while

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[114] M. Rodriguez was never arrested during the strike but he had criminal charges filed against him by Rudy Korste. He was (continued...)

not initially classified by Ed Simovich as falling into that category of individuals who had pending criminal charges, was sent the letter to report on May 30 as were all other strikers who signed the sheet presented by the Company to those individuals present on April 21, to report May 30. When Martiniano Rodriguez reported, stating he wan ready to return to work, Ed Simovich said that it was not an offer to return to work and handed him a piece of paper regarding the criminal charges pending against him. Rodriguez informed Ed Simovich that there were no charges against him. Ed Simovich looked in a

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[114](...continued)
not considered by Respondent to fall into the classification, to be discussed in detail hereinafter, of those individuals having pending criminal charges at the time of the offer to return to work. Rodriguez was subpoenaed, went to court on the basis that Korste alleged that M. Rodriguez hit him in the face. They went to court in March or April 1980.

notebook that he kept and said the Company had charges file against him. Martiniano Rodriguez reiterated there were no charges pending. Ed Simovich told him to go to the sheriff's office to get some document that indicates that the charges were no longer pending and thereafter that he would have a job. Martiniano Rodriguez said that he did not have to show the Company any material or signatures because since they were working through the Union, he could not sign any papers independently. He was given a paper that had no significance to him and he tore it up. Ed Simovich spoke to him through an interpreter but his testimony indicates that he does not and did not have a clear understanding of all that transpired during the meeting. For example, Rodriguez testified that Ed Simovich did not know what he was talking about or what Ed Simovich was referring to because Ed Simovich indicated

Martiniano Rodriguez had criminal charges filed against the Company while Rodriguez understood it was the Company that filed charges against him. M. Rodriguez contended he was not guilty "of anything" and since the Company instituted the charges he inferred that he had no obligation to sustain any burden of proof.

In July 1980, Martiniano Rodriguez went to Champ Corporation and spoke to Phyllis Lund in English.[115] According to Martiniano Rodriguez, he went to the Company and spoke to Phyllis Lund to receive his profit-sharing benefits similar to other employees that he heard were sent their benefits. Phyllis Lund informed him she could not give him his benefits and he inquired how come they were sending benefits

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[115] Martiniano Rodriguez did not demonstrate a proficient command of English during his testimony at the trial.

to other employees or some employees' homes Phyllis Lund replied that she would give him his benefits if he signed a piece of paper that she handed him. Martiniano Rodriguez informed her that he did not want to lose his benefits from the Company or the Union. Phyllis Lund assertedly told him that the only way she could return his profit-sharing to him was if he signed the paper but he was not to worry because he was going to get his job back no matter what occurred. Rodriguez claims, based upon that understanding, he signed the paper she tendered him as a prerequisite to receiving his benefits. He stated that he was forced to sign despite his reservations because he needed the money, he had five children was without a job and had knowledge that there were other people receiving these benefits. Martiniano Rodriguez admitted that Phyllis Lund told him that the only way the Company paid profit-

sharing was if someone quit or terminated their employment, but since individuals had received their benefits that had not been fired or otherwise terminated their employment, and Lund assured him after he stated he did not want to lose his job, that he was not to worry about that, he said "okay." He never told her that he would quit. The document Martiniano Rodriguez signed on July 8, 1980 states: "I, Martiniano D. Rodriguez, hereby tender my resignation from Champ Corp. as of this date.

Martiniano Rodriguez testified convincingly that he did not read the document before he signed it because he speaks little English and does not read English. He did not ask Phyllis Lund to read the document to him because he was informed that the signing of the document was the only way for him to receive his benefits. When asked if he knew he was quitting by signing

the paper, he said in a way, but I did not know because she explained it to me but I signed it because she told me that the persons who had received the profit-sharing had also signed this paper. He stated that he thought the paper was a document that had to be signed to enable the Company to give them their benefits. He understood Phyllis Lund to say "there was no way he would lose his job, that no matter if the Company won or lost or the Union won or lost he would have his job back." Martiniano Rodriguez had heard that Francisco Zamora, Arroyo and, he believes Enrique Figueroa received their benefits with quitting. He inquired why they were getting their benefits and Phyllis Lund informed him that he too could receive them but he had to sign the paper.

On July 11, Martiniano Rodriguez was sent a letter signed by Arvilla Shooter stating that he had voluntarily terminated

his employment with the Respondent and they were enclosing a check covering vacation pay due for the work performed from January 1, 1979 to December 31, 1979. Subsequent to the receipt of the letter, he received a check for his profit-sharing which he deposited. He never talked to anyone at Champ about the letter, he had his son explain the letter to him by translating it for him. Martiniano Rodriguez never showed Champ Corporation the documents he received exculpating him from the alleged criminal charges.

Phyllis Lund asserts that Martiniano Rodriguez came into the office, requested his profit-sharing, stating he had many medical bills. Lund said she inquired if the Union wasn't assisting him in paying those bills and he made no reply but just shrugged his shoulders. He again repeated his request because of medical bills and she told him that "he couldn't have the profit-

sharing until he left and he said well, I have to leave." Lund informed him she would have to get something in writing. She typed up a termination notice, handed it to him inquiring if he could read English, and he said yes, he could. She handed him a pen and he signed it. She went and made a photostatic copy for him, he waited for the copy and then inquired when he would get his money and she said in 2 or 3 weeks. During her conversation with Martiniano Rodriguez, she did not consult or talk with anyone else from the Company. She knew that some individuals in the Company had received profit-sharing checks and that they were subsequently asked to return their money. They all did but one. She did not recall which one.[116] She admitted that Martiniano

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[116] This testimony corroborates Zamora's claim that Coronado did not return the check.

Rodriguez never said he wanted to quit prior to her forming him that he had to terminate his employment with the Company prior to receiving his profit-sharing contributions. She does not know if Martiniano Rodriguez was informed that he could return his profit-sharing money to his account. There was no documentation indicating that Respondent had in fact offered Martiniano Rodriguez the opportunity to return the profit-sharing money to his account.

Ricky Craft testified that since May 30, 1980 he had not received a call back to work from Champ. At no time after May 30, he testified without refutation, did he indicate to the Company that he wanted his profit-sharing benefits. He did receive a vacation check and a letter saying that any profit-sharing due him would be forwarded. He had none forthcoming. Respondent asserts

that no offer of reinstatement had been made because he was permanently replaced and there was no opening requiring his job skills.

Tom Simovich stated that he had been informed Ricky Craft had been shot or injured during the strike and had an occasion to look at a police report regarding the incident.[117] Tom Simovich stated that he knew Ricky Craft was discontented, that he felt he didn't rise in the Company as fast as he could have. He stated that Ricky Craft, in his opinion, was the son-in-law of an individual who worked for the Comapny for many years but did not know anything about his trade. Tom Simovich, in an affidavit

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[117] Respondent tried to introduce evidence using extrinsic evidence to attack Craft's credibility. The subject matter of the extrinsic evidence was not a subject of cross-examination even though counsel for Respondent was not precluded from engaging in cross-examination on the subject. Since the proffered testimony is barred by Rule 608(b) of the Federal Rules of Evidence, it is hereby found not probative and is stricken.

given in December, identified Ricky Craft as one of the eight people in the Company that he considered very violent, constantly harassing individuals and causing trouble.[118] When again asked if Ricky Craft was considered to be violent and guilty of constantly harassing individuals and causing trouble, Tom Simovich replied that Ricky Craft rode around with Steve Baugh and whenever Craft was present in the evening, locks were being jammed with liquid solder and other material. There was no direct attribution of any wrongdoing to Craft. He was not sure whether Craft was on the bargaining committee of the United Auto Workers but he believes he was. If Tom Simovich's testimony were to be credited, it

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[118] The others identified as troublemakers in that affidavit were Solis, Ortiz, Figueroa, Zamora, Baugh, Valenzuela and Almaroz.

would be at odds with his son's testimony in that Tom Simovich is asserting that Ricky Craft would not be reinstated. He was considered a troublemaker guilty of harassment, violent conduct and placing solder and other materials into various locks around the Company property. Based in part upon the disparity between Tom Simovich's testimony, which is contrary to Respondent's representations and Ed Simovich' s testimony, inferring that Ricky Craft was not reinstated or offered reinstatement because of his being deemed permanently replaced. Based on demeanor and inherent probabilities, both witnesses are not credited. Accordingly, the bases for the failure to reinstate him are found to be mere pretext.

It is also noted that Mickey Lambright was placed in the same group of Steve Baugh and Ricky Craft and he also has not been offered reinstatement. Mickey

Lambright did not appear and testify. Steve Baugh, who was also considered a troublemaker, was inexplicably offered reinstatement on May 12.

Francisco Zamora, another member of the Union's negotiating team, who was classified as being permanently replaced, has not been offered reinstatement to date.[119] According to Ed Simovich, after consulting with Peterson, the foreman under whom Zamora worked, Zamora was deemed not to be a highly skilled employee, he was described as not

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[119] There was a question raised by Respondent as to whether Zamora was disabled sufficiently as to preclude reinstatement in his former job. That question was not the subject of any evidence demonstrative of how the injury precluded him from performing his job. Therefore, the evidence is found to be not probative of a lawful reason for failure to reinstate Zamora. There was no medical documentation that his disability is of the nature and type that would preclude or impair his performance as an operator of any machine that he would be required to operate while in the employ of Respondent.

having a great degree of competence. Therefore, the replacement was found to be much more beneficial to the Company. According to Ed Simovich, he has only seen Zamora work on the longbed engine lathe, that was the sole skill he assertedly holds. His replacement can work on both the turret and the small engine lathe operations in addition to the longbed engine lathe. Tom Simovich testified that Francisco Zamora had the worst attendance record of any man working for him, that he would have to hire labor attorneys or someone to fire him otherwise he would have fired him. He made the statement despite the fact that he admitted that Zamora, who was initially hired by Respondent in July 1968, quit for a short period of time, less than a day, to work for Safeway, and was rehired by Champ after having worked at Safeway only one evening. When Zamora told Tom Simovich that he wanted to try the Safeway job, Tom

Simovich assertedly said that there was no problem, he could come back any time. Tom Simovich displayed hostility toward Zamora, saying that he was the type of individual who smiled at your face but stabbed you in the back. In describing the basis for failing to reinstate Zamora, neither Tom or Ed Simovich mentioned Tom Simovich's statement to Zamora on March 7 that he would never work for Champ again. That Respondent retained Zamora in its employ since 1968 and rehired him in 1979 after he quit for a very short period of time belies the contended dissatisfactory nature of the employee's performance. Furthermore, the contention that Zamora had a very poor attendance record was not substantiated by any documentation from the records of Respondent. This bare assertion without producing any records which are in the dominion and control of Respondent is demonstrative of failure to reinstate based -

on unlawful motive rather than a belief that the individual was permanently replaced.

Tom Simovich also stated that Lorenzo Franco was a troublemaker, refusing to do some work and defying the leadman. Lorenzo Franco was employed by Respondent August 23, 1977, and was Paid a mid-range hourly salary indicating a fair skill level. Tom Simovich further asserted that Lorenzo Franco complained that smoke was bothering him in the area where he was working and therefore it was his excuse for constantly milling around the plant. Instead of discharging the man, Tom stated that he put him in area where there was better ventilation and he could apply himself to a job without wandering around. It was asserted that Lorenzo Franco was doing about a third of the work of anybody else similarly employed. It is averred that Lorenzo Franco was reprimanded because he was deliberately

slacking off on the job but the reprimand was not produced into evidence. When reprimanded, Tom Simovich claims that Lorenzo Franco became very defiant. There is no documentation regarding any of the assertions of Lorenzo Franco's alleged deficiencies as an employee. The fact that he had remained in the employ of Respondent for a couple of years prior to the commencement of the strike without any documentation as to reprimand, discipline or poor performance on the job is unexplained. Since such documentation again would be solely within the dominion and control of Respondent, the failure to produce such documentation warrants the making of an adverse inference. Further, the fact that Lorenzo Franco was not considered a superior employee does not of itself warrant the failure to reinstate this striker if there was a job opening. The utilization of many reasons for not reinstating such a longterm

employee is very suggestive of improper motive and such improper motive is herein found.

Respondent made no specific references to the abilities of Antonio Andrade, Alejandro Arroyo, Javier Arroyo, David Coronado and Enrique Figueroa as employees.

7. Employees With Pending Criminal Charges

According to Ed Simovich, sometime between May 5 and May 7, 1980, he telephoned Detective Terhorst to get a summary of all pending criminal charges. He believes Terhorst gave him the names of strikers with pending criminal charges and the nature of the charges.[120] The strikers that fell

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[120] As previously indicated, those individuals that Ed Simovich' deemed as falling within this category are Carlos Almaroz, Ernesto Arroyo, Alberto Cortez, Ruben Gutierrez, Cesar Moran, Javier Olague, Eduardo Ortiz, Jose Padilla, Ramon Rodriguez, Martiniano Rodriguez, Joe Solis, (continued...)

within this category were also requested to report to the Company, at the personnel office, on Friday, May 30, 1980. Ed Simovich asserts that he spoke to these 13 individuals separately, informing them that they were not going to be called back to work on May 30 because they had "criminal charges with the D.A.'s office. Ed Simovich asserts that he told each of these 13 individuals that it was their responsibility to clear up the criminal charges and then notify the Company. On that day he gave them a letter which stated:

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[120](...continued)
Heriberto Valenzuela and Jose Villavicencio. Also as previously indicated, Vincente Banaga was placed in the same category; however he did not appear on April 21 and, for some unexplained reason, was not treated in the same manner as the other individuals named by Terhorst pursuant to Ed Simovich' s inquiry. As noted by Counsel for General Counsel, Banaga was given one year probation; none of the other employees in this category was similarly convicted and sentenced.

> You currently have pending criminal charges with the District Attorney's office for STRIKE-RELATED CRIMINAL VIOLATIONS. You are, therefore, ineligible for work reinstatement. Should your arrest(s) be considered to be false, your reinstate-ment to work will be reconsidered at that time. Signed, Tom Simovich, General Manager.

Ed Simovich further asserted that these individuals, after they cleared up the charges, would have to bring a notification or a piece of paper to the Company demonstrating that the charges were "cleared up."

According to Joe Solis, when he met with Ed Simovich on May 30, one of the guards took him to a room where Ed Simovich was conducting the interviews and Ed Simovich told him, "We can't hire you back to work at this company. You can't have a criminal charge against you." Solis asserts that he

replied that the Company was the source of the criminal charges flied against him. Simovich then stated, "We can't hire you back. After the charges are dropped, maybe we'll put you on the waiting list. At that juncture, Simovich gave him a piece of paper to sign indicating that he was present at the interview. He was also given the previously described letter. Solis stated that there was no discussion of his physical or mental condition at the time, just that Ed Simovich indicated that he could not help the fact that he and his father were responsible for the filing of charges against Solis and that if he cleared his name he would be put on a waiting list, and if there were any openings the Company would call him.

Jose Villavicencio testified similarly to Solis. According to Villavicencio, when he came to the Company on May 30, he talked to Ed Simovich who had an

interpreter present. The interpreter was a guard. Ed Simovich told him that if he wanted his job back, he had to clean up his record. Ed Simovich then gave him a piece of paper which indicated that he had no right to receive any benefits from unemployment, that he had to look for a job on his own.

Ramon Rodriguez testified in a similar vein. He stated that he got a telegram telling him to report to Respondent on May 30. He went to an office where there was a guard present to assist him in translations from Spanish to English and English to Spanish. According to Rodriguez, Ed Simovich asked if he wanted his job back and Ramon Rodriguez replied in the affirmative. At that point, Ed Simovich told him to go to court, that he had to go the police station and bring Respondent proof stating that his record was clear, that he had no criminal charges pending against him.

That was all that was said during the conversation, then Ed Simovich gave him a piece of paper repeating these conditions for obtaining reemployment.

Carlos Almaroz also testified that when - he went to the Company on May 30 and talked to Ed Simovich, with a guard whose name he could not recall acting an interpreter, he was given a letter by Ed stating that because he had ending criminal charges against him, if he wanted to work, he had to see the judge, the district attorney or someone at the sheriff's department to "clear up he charges; [o]therwise he could not have his job." On June 6, 1980, over the signature of Tom Simovich, Almaroz was sent the following letter:

> This letter is to reconfirm our meeting with you on May 30, 1980, to let you know that you are on indefinite suspension status and at this time are

not eligible for work reinstatement. We we looking deeply into your pending criminal charges which resulted from your arrest(s) for strike-related violence. Should your arrest(s) be determined to be false, we will be in touch with you regarding your - reinstatement to work.

We want to again remind you that you may have unemployment benefit rights and strongly urge you to contact the California Employment Development Department.

According to Ernesto Arroyo, Larry Rincon and a secretary were present when he talked to Ed Simovich on May 30. Larry Rincon told him that his job was there but he could not be returned to work because he had criminal charges pending against him. He was then given a letter which repeated what Ed Simovich told him. Arroyo received a letter

very similar to that quoted hereinabove for Carlos Almaroz, also dated June 6, 1980; the only difference was the address.[121] Jose Padilla also met with Ed Simovich in the presence of a security guard on May 30 and was told that because he had criminal charges pending that he had to first get those "cleaned up." Padilla replied that he had no charges pending against him, that the security guard had dropped the charges. Ed Simovich assertedly said good. On September 26, he got a telegram dated September 24 instructing him to report to work on September 29, 1980 at 7:15.

Respondent argues that Ed Simovich clearly instructed, during the May 30

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[121] Also receiving such a letter was Cesar Moran, who testified about the May 30 letter similarly to the employees discussed hereinabove. Ruben Gutierrez Ramon received the same letter on or about June 6, 1980, and he also testified similarly to those quoted hereinabove about the meeting on May 30 with Ed Simovich.

meeting, all strikers who had criminal charges pending against them that they could not be reinstated until they cleared their own records and so informed the Company through the submission of probative documents. Ed Simovich also testified that once the criminal charges were dismissed or otherwise disposed of, it did not mean that the employees would automatically be reinstated, he would also take into consideration the complaints received and recorded during the course of the strike in the notebooks described hereinbefore. Ed Simovich admitted that he did not inform the employee strikers in this classification that consideration would be given to allegations of wrongdoing by replacement workers or supervisors of activities allegedly occurring during the strike. The 13 strikers, as Ed Simovich admitted, were never confronted with these allegations or afforded an opportunity

to reply or explain their conduct. The Respondent's claim that the strikers in this category were informed that they had the obligation to clear up their arrest records, inform the Company, and then and only then might they be considered for employment, is found to have been not clearly explained to the individuals during these meetings. This finding is based upon the following: The guard that was in attendance did not testify as to the explanations he gave the strikers;[122] the letter given to the employees on May 30, admittedly by Ed Simovich, stated that they are ineligible for work reinstatement because of the pending criminal charges which the Company was "looking deeply into", and there was no indication that other matters would be taken

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[122] Ed Simovich could not speak Spanish; therefore, he does not know what the strikers were told during these meetings.

into consideration. The understanding of their obligations, as testified to by most of the strikers in this category, was reconfirmed by Respondent's June 6 letter which stated that if the arrests were determined to be false, they [R]espondent would be in touch with them regarding their reinstatement to work. The wording of the June 6 letter further indicated that the Company was investigating the pending criminal charges which resulted from their arrests which several of the strikers clearly took to mean that the Company was investigating the matter and that the strikers did not have the obligation to inform the Company as to the disposition of the charges. Furthermore, neither the May 30 nor the June 6 letters indicate that the employees were requested to keep the Company apprised of what occurred during the processing of the charges pending against

them. Accordingly, the asserted basis for suspending these 13 individuals to afford an opportunity to further investigate the allegations made against them with the sheriff's department as well as by employees within the firm is not credited. In addition to the above reasons, Ed Simovich was not exceedingly candid in his replies, he was not candid with the employees that he interviewed because he admittedly did not inform them that he was taking into consideration allegations by co-workers, therefore depriving them of any opportunity to address themselves to these considerations to try to show mitigation or wrongful allegation, contrary to the practice he established when replacement workers or other employees who did not go out on strike were accused on wrongdoing.[123]

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[123] See, for example, the uncontroverted testimony that Joe Sanchez, who was in the car at the time that the (continued...)

[123](...continued)
altercation resulting in the stabbing of Pedro Lopez occurred and the claim that there was a potential of gang involvement involved, did not prevent the Company from hiring Joe Sanchez without any investigation by the Company into the matter. Ed Simovich initially testified he was unaware of the fact that Sanchez was initially arrested in connection with the stabbing of Pedro Lopez. Then he testified he was present when Sanchez was taken into custody or went along with the police. However, he stated that he was not aware that the taking into custody constituted an arrest. This lack of candor and disparity of treatment between strikers and others is not an isolated incident. Another example is that Ramon Rodriguez was considered to have committed such egregious acts as to warrant at least the delay of his reinstatement but at the same time the individual who fought him twice, Freddie Vallejos, was not even disciplined. Additionally Vallejos was arrested for swinging an ax during another incident not involving Ramon Rodriguez. Vallejos was not disciplined or even questioned by Respondent regarding these incidents, even though Vallejos was convicted of a misdemeanor and placed on probation. Another area of disparity in the treatment of strikers compared to those individuals who did not go on strike is with reference to harassment of returning employees after the strike ended. As will be discussed in more detail elsewhere in this decision, a number of returning strikers suffered verbal and physical abuse, and every time they made an allegation of

(continued...)

An example of both the disparity in treatment and the failure to introduce evidence consistent with the allegations involves Jose Padilla. Padilla only asserted that the charges had been dropped. There was no demonstration that he was required to show documentation for the allegation, yet was offered reinstatement. The day he returned to work, September 29, 1980, reported to Dick Rowe who left him at the machine shop at a desk where the foreman sat and told him to wait to pick up some supplies for him. He was approached by three employees in white T-shirts when an individual described as being a short fellow, the nephew of Ernesto

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[123](...continued)
wrongdoing on the part of an employee who had not been on strike, Simovich questioned that employee to ascertain if they were guilty of wrongdoing. The disparity of treatment was not explained and such disparity is indicative of wrongful motive.

Lopez,[124] asked what he was doing there and Padilla indicated that he was called back to work. The nephew asked if he was hungry,[125] and Padilla replied he was not hungry, he came because he was called back to work. The nephew of Ernesto Lopez then left and shortly after returned with Ernesto Lopez and an individual identified as the brother of David Nieblas, who has been identified on the record as Arturo Nieblas. Ernesto Lopez asked him, "Hey, you don't want to work?" Padilla replied he wanted to work and he was told the foreman was waiting for him by the drill press, according to Lopez's nephew. When Padilla, who was diminutive, started

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[124] He did not know the nephew's name.

[125] It appears from the testimony of several of the witnesses that inquiring if an individual is hungry has a negative connotation among the residents of East Los Angeles and is taken as a perjorative or a negative inference regarding one's ability to earn a living.

walking toward the drill press, Nieblas asked him what he was doing there and Ernesto Lopez said, "I don't want these son of a bitches in here." According to Padilla, Lopez then punched him in the stomach as did Nieblas and Lopez's nephew. Padilla said he fell down and Ernesto Lopez told him, "You get the hell out of here. The next time you come, I kill you." Padilla then became nauseated he was trying to leave, vomited and was assisted by an individual who lives across the street from the Company. Padilla phoned Frank Zamora to seek assistance.

When Padilla returned to the Company offices, Gary asked what happened, was told, and asked him to talk to Tom or Ed Simovich. Ed Simovich was not there at the moment. Padilla went into the office and the switchboard operator inquired what happened. Padilla explained and Nick Ianello was designated to take him to the hospital.

Padilla filed a police report but he does not know what happened afterward regarding the processing of the report, After he made the police report, Nick Ianello picked him up at the hospital, took him to the Company where he explained everything to Ed Simovich. Ed Simovich was given the names of the individuals who beat him up and Padilla asserts he inquired why something wasn't done about it, "to tell his employees not beat other people up." Padilla asserts that Ed Simovich shrugged his shoulders and he explained that he could not do anything about it. Ed Simovich then asked if he wanted to return to work, and he replied no, he would have to see the doctor because he did not feel well. He returned the apron given to him and he went to see his own doctor.

He has not returned to work since that incident although he has called he Company twice. The first time he called the

Company was on September 31, and he talked to a woman in personnel explaining he was off from work because of the incident and she explained she knew that they had sent him to the doctor. He called the second time on August 5 and asked the individual who answered to tell him that Jose Padilla called since no one in an official capacity appeared to be present, and he said they hung up on him. On October 10, 1980, he received a letter dated October 10, 1980, over the signature of Arvilla Shooter, office Manager, which stated:

> You have not reported to work for your scheduled work shift for the last five (5) days, and neither have you notified the Personnel Office or supervision that you are unable to work. This is in violation of the Company Call-In

policy beyond the time period for which you are subject to immediate dismissal. Thus, you are hereby notified of your termination of employment with this company unless you can demonstrate there are extenuating circumstances beyond your reasonable control.

The payroll department will be notified of your termination, and they will be forwarding to you any monies due to you.

Padilla stated that as of the date of his testimony in January 1981, he was still under a doctor's care due to the injuries sustained during the incident described above. No medical evidence was placed into the record. Based on demeanor, clarity of recollection and the forthright candor with which Padilla testified, his testimony is credited.

Ed Simovich testified that Dick Rowe had met Jose Padilla at the timeclock, in confirmation of Padilla' s testimony, and was going to get some gloves. Rowe asserts in his testimony that he mentioned he was going to have a meeting with the employees. Ed Simovich did not similarly testify. Rowe indicated the meeting was to explain that the returning strikers were not to be harassed. Rowe went to get some gloves for Padilla and when he returned 10 minutes later, Padilla was gone. Upon looking for Padilla, he found him across the street at the main office, claiming he was attacked by some employees. He was taken to the doctor by Nick Ianello. The foreman of the area, Krivosha, had not seen anything. They talked to Ly Hen and Alfredo Cisneros who were working nearby

where Padilla was to wait, and they said they hadn't seen anything.[126]

Padilla, according to Krivosha, indicated that he had lost a son 6 to 8 months prior to his return to work in a knife fight and because of all the problems, he did not want to experience any difficulty with the employees who did not go out on strike. He had heard that there had been such trouble. Krivosha told him that he would attempt to spend as much time as he possibly could near Padilla to make him feel better. He described Padilla as being an older gentleman in his fifties. Krivosha took the employees into a room with the exception of

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[126] Although Ianello was responsible for taking Padilla to the doctor, he did not testify on the subject. If the employees were at the meeting described by Rowe, why Cisneros and Ly Hen were questioned is unexplained. The inherent inconsistencies in the testimony given on behalf of Respondent require discrediting that testimony.

Norbert Rumenapp, who works in the far corner, to meet with him. He told Padilla to stay at Krivosha's desk, that there would be no one in the room but he and Rumenapp and therefore he would be safe. He told the 11 or 12 men about the Cortez incident.[127] According to Krivosha, Padilla did not identify the perpetrators or alleged perpetrators.

Ed Simovich said that he talked to Ly Hen and Alfredo Cisneros who were working

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[127] Elpidio Cortez returned to work and stated that when left alone for 15 or 20 minutes he was harassed, people called him names, verbally threatened him, but no one touched him physically. He named Arturo Nieblas as a perpetrator. Cortez left the Company's employ stating that he was afraid and would not work under those circumstances. Cortez, before leaving, spoke to Ed Simovich several times. According to Cortez, the supervision at Champ indicated they would not do anything for him. Also, Cortez told Ed Simovich that Arturo Nieblas hit him in the arm with a fist. So there was violence. He stated that was all the violence he wanted, that he was quitting. The similarity of treatment lends further credence to Padilla's contentions.

near Krivosha's desk and they hadn't seen anything. Simovich's testimony is found to be disingenuous since Krivosha admitted that he had taken everybody except Rumenapp out of the room while Padilla was waiting for him to return with the gloves. Simovich admitted that Padilla identified Nestor Lopez and two other people wearing white Tshirts, one a straw hat, when Simovich went with Nick Ianello to pick Padilla up at the doctor's office. This admission discredits Krivosha's testimony. According to Simovich, Padilla was released by the Dalton Medical Group, the medical facility used by Respondent. Simovich stated that he looked to see where Padilla threw up, could not find anything, and indicated he really didn't believe Padilla.

Ed Simovich also admitted that the following morning he got a message from Barbara Sorreno, the receptionist, that Jose

Padilla called in and said his doctor had told him to stay off work for the rest of the week, he would be returning on Monday, October 6. He said that was the last they heard of Padilla indicating that Padilla at least made one phone call informing the Company that the injuries sustained caused him to be off work part of the time. Padilla never brought any medical release or any statement from his doctor.

Simovich stated that he investigated the incident by talking to Alfredo Cisneros, Ly Hen, Victor Castonguay and Nestor Lopez who denied anything happened. As previously indicated, since Krivosha testified that nobody was in the area except Norbert Rumenapp, and Ed Simovich did not talk to that individual, the investigation did not appear to be of the same nature and quality as those he engaged in when employees who worked through the strike alleged

wrongdoing on the part of strikers. The fact that he talked to Nestor Lopez who denied that he had any involvement in the incident is contrary to the manner in which he treated strikers who were not advised of any allegations by employees lodged against them regarding harassment. They were not afforded a similar opportunity to deny their participation in harassment or other wrongdoings.

Although Nestor Lopez denied striking Jose Padilla or otherwise harassing him, he did admit seeing Padilla and inquiring what he was doing there and telling him, "It was best for him to go to hell and that was all that I told him and then the boy and I kept walking and my little truck was there." He said he never touched Padilla. The admitted animus of Nestor Lopez and his demeanor lead me not to credit his testimony.

Simovich indicated that Padilla was offered reinstatement, not because the criminal charges were dropped, but because he was advised by Hoy that Counsel for General Counsel required reinstatement of six employees in this classification,[128] including Padilla. This assertion is not credited inasmuch as Padilla indicated that the charges had been dropped and there was no showing that the wrongdoings he was alleged of otherwise perpetrating were of such a nature as to disqualify him from further employment with Respondent, according to the measure used or claimed to have been used by Respondent. Initially, Ed Simovich stated that Hoy dictated a letter to be sent to these individuals offering them reinstatement pursuant to an agreement with the National Labor Relations Board. Hoy then dictated the

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[128] Those employees with pending criminal charges.

letters to Ed Simovich. The letters, dated September 26, 1980, were sent to Ernesto Arroyo, Alberto Cortez, Cesar Moran, Javier Olague, Ramon Rodriguez, Heriberto Valenzuela and none was sent to Padilla who would have been the seventh striker in this category, further placing into doubt Ed Simovich's testimony. The letters, signed by Tom Simovich, stated:

> We are changing your present status from indefinite suspension to layoff due to lack of work. When there is a job opening for which you are qualified, we will reinstate you to work. You may have unemployment rights and we encourage you to contact the California Employment Development Department on this matter. By this offer of reinstatement, we do not waive any of our rights or defenses

we may have on any legal matters regarding your reinstatement.

Ed Simovich testified he took the letter down as dictated, in its entirety, by Hoy and did not insert any of his own language. He then testified, after further examination, that he inserted the last paragraph because he did not agree with the reinstatement of these employees. Hoy testified that he advised Respondent to return all the strikers as quickly as possible with safety and production requirements in mind and that for those strikers the Company did not have an immediate job opening, they were to be given preferential employment rights. He further stated that those strikers who had criminal charges were placed in a different category of reinstatement. There was no description of an agreement with Counsel for General Counsel regarding the 6 reemployable strikers

of the 13 employees placed in this category or whether these conversations may have involved settlement talks, which would render the testimony inadmissible. For these as well as the above stated reasons, the lack of candor, forthrightness, full disclosure, demeanor, inherent inconsistency, lack of corroboration are all factors leading to the discrediting of Ed Simovich' s testimony.

On October 31, 1980, over the signature of Arvilla Shooter, Respondent sent similar letters to Villavicencio, Almaroz, Ortiz and Ramon Rodriguez informing them they were terminated as, follows:

> The company has investigated the facts concerning your suspension of employment because of strike-related criminal violence and has reached a decision concerning your employment status with this company. As of thin

> date, your suspension is being converted to termination of employment. Your actions against employees of this company have been investigated by our agent of the National Labor Relations Board which has ruled that we are not compelled to return you to work.
>
> The payroll department has been notified of your termination and will be forwarding to you any monies due to you.

Ed Simovich indicated that Hoy represented to him that Counsel for General Counsel informed him that it would be permissible for Respondent to discharge these four employees. Neither Hoy nor Counsel for General Counsel confirmed this representation and there were no legal documents or other indicia supporting this representation. Albeit, there has been no determination by the

National Labor Relations Board which is binding herein and would permit the affirmation of the discharges without consideration of the action on the merits consistent with the established precedents. Accordingly, the dismissal of all the strikers with pending criminal charges against them will be considered on their merits without being bound by any unsubstantiated and uncredited claim that a Board agent made the representations asserted herein.

The records submitted into evidence indicate that the criminal charges against Valenzuela, R. Gutierrez, Javier Olague and Ernesto Arroyo were dismissed on December 4, 1980. As of January 23, 1981, the docket for the municipal court of Rio Hondo Judicial District, County of Los Angeles, disclosed that the charges against Ortiz were still pending. Those charges filed against Carlos

Almaroz were dismissed on November 30, 1979. Jose Villavicencio plead nolo contendere and was fined $70.50 on December 3, 1980. The charges against Banaga, Moran and Cortez were dismissed on November 4, 1980.

8. Other Reinstatement Events

A review of the record indicates that the following striking employees received telegrams notifying them to return to work as follows: On May 5, John Gresko was told to report to work on May 9;

On May 7, Henry Carrillo and Filiberto Ruiz were told to report on May 9;

On May 13, Tomas Vargas and Jose Naranjo were told to report on May 15;

On May 12, Steve Baugh was told to report on May 16;

On May 15, Manuel Cruz and Nicolas Diaz were told to report on May 19;

On May 19, Armando Escandon, Elpidio Cortez and Ernesto Franco were told to report on May 21;

On May 20, Pedro Pena, Salvador Fernandez and Erasmo Salazar were told to report on May 22;

On May 21, Rene Gallardo, Salvador Garcia and Octaviano Arellano were told to report on May 23;

On May 23, Ernesto Cortez, Salvador Elizarraras and Ernesto Lopez were told to report on May 27;

On May 27, Wallace Kerr, Pedro Garcia and Alejandro Lopez were told to report on May 29;

On May 28, Pedro Lopez,[129] Jose

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[129] Pedro Lopez, as previously indicated, suffered severe injuries as a result of a stabbing incident on October 19 and had not been released to work by May 30. When he did receive such release from his doctor, he went to the Company in June, they took a photocopy of his release and told him (continued...)

Pedroza and Raymond Wise were told to report on May 30.

Although Elpidio Cortez received the telegram directing him to report to work on May 21, 1980, he asserts that he had his son, who speaks English, telephoned Respondent and informed them that he would be unable to report to work on May 21 because he had to go out of town and he had already picked up his tickets and could not postpone

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[129](...continued)
he could not work in his present condition. There was an indication that perhaps he could do some light work that would not affect the injury he had sustained. He was not offered any light work. The fact that no light work was offered is pertinent to the subsequent discussion regarding Heriberto Valenzuela who was struck in the head by an object after he was reinstated. There was an inference by Respondent that perhaps Valenzuela could do light work. However, there was no showing that such light work was available either for Lopez or Valenzuela and, even assuming light work was available, that such employment was ever offered to these employees. The period of his entitlement to backpay is not clearly shown on the record and must be determined during the backpay hearing.

the Journey. Cortez testified that he requested his son to inform the Company during this conversation that they had to pick up a car located in Idaho that had been previously confiscated by the United SLates Department of Justice, Immigration and Naturalization Service. E. Cortez also instructed his son to inform Ed Simovich that he could return to work that Monday. He understood from his son that Ed Simovich said he could not report to work the following Monday, rather than the Wednesday designated in the telegram, but that Cortez would have to call the Company upon his return to ascertain if he would be accepted for reemployment.[130] His son did not tell him that when he contacted the Company upon his return from Idaho, he was to bring

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[130] Cortez did place in evidence copies of the tickets purchased from Greyhound Bus Lines for Twin Falls, Idaho.

documentation verifying his assertion of the need to delay his reporting to work. Cortez returned from Idaho around May 23, but did not report immediately to Respondent. On May 27, Cortez went to Respondent in response to the telegram to report to work. He talked to Tom Simovich, Jr. in the presence of Salvador Elizarraras who also had been on strike and was also returned to work, and Tom Simovich, Jr.[131] who left with Cortez's telegram, came back approximately 5 minutes later and instructed him to wait there. Subsequently, Dick Rowe came to talk to him but was paged by Tom Jr., and left after instructing Cortez to wait for Ed Simovich to come. About 10 minutes later, Ed Simovich came and inquired if he was coming to work. When Cortez replied in the affirmative, Ed Simovich

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[131] Tom Simovich, Jr. did not appear and testify, and therefore Cortez's unrefuted testimony to this juncture is credited.

inquired why he showed up for work since he did not communicate with the Company and had not reported on the scheduled date. Cortez replied that his son had reported that he could not return on the date specified. Ed Simovich stated that he was very sorry, but Cortez could not work and Ed Simovich did not give him an opportunity to show the papers from the authorities that explained his absence.

By letter dated June 16, 1980, over the signature of Arvilla Shooter, Respondent sent Cortez the following letter:

> You were given notice of suspension from work on May 27, 1980, when you reported for work that day instead of May 21. You were instructed to return to work on May 21, in our reinstatement telegram of May 19, 1980. We have been attempting to investigate the

> suspension but need your cooperation. Your home phone number was called by Mr. Ed Simovich on June 3 and again on June 4, and a message was left for you to call the Champ personnel office so that we can investigate the circumstances surrounding your absenteeism. If you do not call the personnel office by Thursday, June 19, we will consider you not interested in returning to work and notify the payroll department that you have voluntarily terminated your employment with Champ.

Cortez forthrightly admitted that he did not call the Company as requested after receipt of this letter. In response to the failure to reply to the letter, another missive was sent by the Company to Elpidio Cortez on July 11, 1980, stating that they had not heard

from him and assumed that he voluntarily terminated his employment with Champ. They enclosed a check for his vacation pay. Counsel for General Counsel and Respondent agreed and stipulated that no claim was being made on behalf of Mr. Cortez after July 11, 1980.[132]

Eventually Elpidio Cortez was reinstated on August 4. He asserts that ring the day his coworkers threw objects at him and that he was hit in the shoulder by Arturo

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[132] The Union would not join in the agreement, asserting there was a continuing claim for backpay after July 11 to the present time. Part of this claim is based on a charge that Respondent constructively discharged Cortez when he did eventually report for work on August 4 and terminated working that day after being, he asserts, struck by Arturo Nieblas and called names in the language of Billingsgate. This charge was dismissed by the Regional Director after investigation, the dismissal was appealed, and the dismissal was upheld. Accordingly, the Charging Party was informed that relitigation of the issue would not be permitted herein. However, the evidence of harassment would be permitted to be adduced solely to demonstrate motive.

Nieblas in the presence of a leadman. He did not know the name the leadman. He informed the supervisor he wanted to speak with Ed Simovich because of the problems he was experiencing particularly the throwing of metal and steel objects at him which had been wrapped in tape. He did not see who threw the objects at him. Initially, he asserts the foreman went and said something to Arturo Nieblas which he could not overhear. After speaking to Nieblas, the foreman telephoned Ed Simovich who came to the area. Cortez showed Ed Simovich the metal objects that were thrown at him as well as stones that were thrown at him and also informed Ed Simovich that Arturo Nieblas had struck him in the arm, and inquired what he was going to do about providing for his safety. Cortez formed Ed Simovich that he could not continue working under those circumstances and wanted the Company to control their employees,

including stopping them from cursing at him. He then saw Ed Simovich talk to Arturo Nieblas, say something to him, and Cortez decided that there was no remedy for the situation. Simovich, during the series of incidents, said at one juncture that "he couldn't do anything because I was telling him to lay him off or for me to look for some other job because I could not continue like this." Simovich indicated that he could not do anything about the situation, that the workers who continued their employment and work activities during the strike or were hired during the strike were afraid of being discharged, that it was up to Cortez to make a decision as to whether he wanted to continue under those circumstances.

After the second conversation with Ed Simovich, Cortez decided to leave. He left with Armando Escandon who started at the same time and quit at the same time because

of the harassment. Cortez stated during the second conversation with Ed Simovich he informed him that he could not work there anymore because Arturo Nieblas told him that he could go and complain ten times, that Nieblas was not going to stop his harassment, that he was going to continue hitting Cortez. Nieblas was described without refutation as being a large, strong, young man, much taller and stronger than Cortez. When Cortez asked Ed Simovich if he could keep he and Nieblas apart, Simovich told him that he couldn't. None of the objects thrown at him hit him, but after he was struck in the arm by Nieblas he told Ed Simovich that his shoulder hurt and he would like a note go to the doctor. Ed Simovich replied that he could not give him assistance. He never heard Nieblas being cautioned about the incident. He only saw Ed Simovich speaking to him. Arturo Nieblas did not testify.

Ed Simovich asserts that Elpidio Cortez's son did call the office and report that the car was stolen and they had to go to Idaho to pick it up. Simovich further stated that he informed the son that his father was due to report to work on Wednesday, the 21st, and if he didn't show up on that day he would have to provide some documentation to explain his absence. The letter was then sent to Cortez on June 16. They tried to have a telephone conversation with individuals at Cortez's house and left messages on both June 3 and 4 that he was to call in an effort to assist them in their investigation of his suspension. He does not recall who answered the telephone at Cortez's home but he had Frank Devine who spoke Spanish leave the messages. The first time he saw Cortez after the incident where they considered his failure to return the calls or reply to the letter as a voluntary termination, was August

1980. They reinstated Cortez, according to Ed Simovich, based on Hoy's advice after Cortez was terminated because of a conversation he had with Counsel for General Counsel. As was the case mentioned hereinbefore, Hoy did not substantiate this claim, and the asserted involvement of the Office of General Counsel was again unexplained, substantiated and, therefore, is not credited or otherwise found to be a binding determination.

With respect to the asserted harassment that occurred on August 4, Ed Simovich stated that the first incident he was involved in occurred mid-morning after he received a telephone call from Dan Krivosha stating that Elpidio Cortez wanted to talk to him. Simovich went to talk to Cortez who told him that objects were being thrown at him but he did not know who threw the objects. Ed Simovich then asserts he talked

to Don Westlein who worked next to Cortez. Westlein stated he had not seen anything. Cortez was instructed to tell Dan Krivosha, Bob Peterson or Don Westlein if he experienced further difficulties. He does not recall If he had any conversations with A. Nieblas that day.

About noon the same day, Elpidio Cortez came to his office and said that he was not going to work anymore, that he was going to leave. Simovich offered to go back with him and Armando Escandon, who was also at the offIce. Simovich did return to the work area with Elpidio Cortez and talked to Don Krivosha and Don Westlein, which is when Cortez assertedly claimed Arturo Nieblas hit him in the arm. Westlein stated that Nieblas had come over and the two of them were arguing in Spanish but he did not know what occurred, no one had touched anybody. Nieblas, according to Ed Simovich, said he

did not hit Elpidio Cortez but that Cortez had a gun and was going to use it. According to Ed Simovich, since no one had seen anyone hit another individual, he instructed everyone to go back to work and that's when Cortez said no, he was leaving. He went over to the new machine shop to say goodbye to Bob Peterson, shook his hand and walked out. Again, it is noted that Ed Simovich, when an allegation was made against an employee working in the shop during the strike, he investigated that wrongdoing by consulting with the ostensible perpetrators. During the strike, similar allegations of wrongdoing made against strikers were not similarly investigated and even after the strike such allegations, although assertedly one of the bases for decisions to not reinstate striking employees, never were investigated by similarly consulting with the asserted perpetrators.

Similar to the case of Elpidio Cortez, Armando Escandon was also sent a telegram on May 19 informing him that he was to report to work on May 21. On May 21, Escandon asked his niece to call Respondent and inform the Company that he was experiencing car problems and would be unable to report to work that day. He stated the problem with the car was with the electrical system and he had the difficulty repaired by a neighbor who was a mechanic. He paid the neighbor in cash and had no documentation that the repair was effectuated as claimed. Escandon reported to work the following day and talked to Ed Simovich in the presence of an interpreter, Ernesto Lopez. He repeated he had difficulty with the electrical system in his car and was told that he would be suspended "until the on-going problem with the union was resolved, they were going to investigate my case." Ed Simovich, through

Ernesto Lopez, also inquired if he had a receipt or some kind of proof that his automobile was in need of repair, he replied no, that he had a friend fix the vehicle at home and that he paid him $45 for the repair. Escandon was then told he was suspended.

Subsequently, Escandon stated, probably sometime in June, he received a telephone call from an individual that identified himself as an interpreter who was speaking on behalf of the owner. The interpreter inquired why he had not come to work and he replied that he had difficulty with the electrical system in his car. The interpreter then inquired if he was afraid to come to work and he responded no, he was not afraid.

Ed Simovich stated that a child called and stated that Escandon had car problems, that he was getting his car fixed and would report to work the following day.

Ed Simovich stated he inquired what the car problem was and the child stated that he did not know. It is asserted that Ed Simovich then inquired if someone could give him a ride, that he would send someone to bring him to work, and the child said no, that he was at the shop getting his car fixed. Escandon came to work the following day and was asked why he did not report the day before. Escandon assertedly said he had problems with his car but did not state what kind of problems. He did not have a receipt for the repairs or the purchase of parts. Ed Simovich then informed him that he would have to investigate, that Escandon was suspended pending the results of the investigation. Escandon then left. Respondent then, according to Ed Simovich, contacted Escandon around June 3 or 4 and again asked what kind of work was done on his car. Escandon assertedly said he did not show up for work

because he was afraid, he heard strikers were having things thrown at them. Escandon then averredly told the individual who called him that the real reason he did not report for work was that he experienced electrical difficulties with his car but did not have any receipt for the work done. Ed Simovich then said that he would get back to him.

Ed Simovich claims he discussed the matter with Ed Hoy and was advised that he could terminate him for lying, so they wrote him a letter on June 19 stating that his son called the personnel office and reported that he had to take his car into the shop for repairs and that he had no transportation for work, that the son was told that some documentation would be needed to justify the failure to report on the day the telegram instructed. The letter further stated that when Escandon reported to work on May 22 and was asked to show proof that the car could

not be driven to work on May 21, that he was unable to describe the nature of the work or state the name of the repair shop where the repairs were effected. The letter mentioned that subsequent phone conversation of June 4, 1980 resulted in Escandon giving conflicting stories, stating on the one hand that he failed to report to work because he feared for his safety and on the other saying that the car problem prevented his reporting to work as scheduled. The failure to provide any evidence that the car was inoperative and was repaired led them to conclude that his failure to return to work was because he did not offer unconditionally to return. They thereby construed his failure to return on May 21 as a voluntary termination of employment. The letter then states, "The reason for your termination is the conflicting explanation of your absence. It appears that the real reason for your absence

was a guarantee for your personal safety. This is a condition we cannot guarantee even though we have taken many recautions to protect the safety of all our employees."

According to Ed Simovich, again pursuant to a discussion with Hoy which Hoy did not corroborate, Escandon was sent a telegram in late July directing him to go to work on August 4, 1980. Escandon reported, as did Elpidio Cortez, on August 4. Escandon reported to work in Ernesto Lopez's paint department and after about 15 to 20 minutes at work, the employees started to throw pieces of metal wrapped with masking tape at him. Escandon could not see who threw the objects at him. He was not struck by any object. Escandon informed Ernesto Lopez that he was leaving because he could not countenance the physical danger. He took his card, punched out, went to the office and gave the card to Ed Simovich. He Informed Ed

that he was experiencing too many problems with the other employees and Ed returned with him to the paint department, talked with Ernesto Lopez telling him that Escandon wanted to quit because of the danger and Escandon said he did not want to quit, he wanted to continue working but that Ernesto Lopez and Ed Simovich had "to calm their people." Escandon continued working and while continuing working evidently Ed Simovich and Ernesto Lopez had a conversation that Escandon overheard. Ed Simovich inquired of Ernesto Lopez if it was true that things were being thrown at him and was told that it was true but that nothing hit Escandon. Ed Simovich then left and the other employees resumed throwing pieces of metal wrapped in masking tape at him. The only individual he saw throwing anything at him was an individual named David. Around noon, approximately six people surrounded

him.[133] They threatened to take him out by force, cursed at him and made profane statements about his family. Escandon then decided to take his timecard and leave. At that time he came across Elpidio Cortez who was also leaving. They both went to speak to Ed Simovich who brought in an interpreter whom Escandon did not know. Ed Simovich inquired why they wanted to quit and then gave them a piece of paper to sign. Escandon said he would not sign anything and left. According to Escandon, Ed Simovich never inquired of any of the employees about the incident other than Ernesto Lopez.

According to Ed Simovich, when he checked to see how Escandon was doing, it was not in response to any complaints by Escandon initially. That he reported that things were

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[133] The individuals were named: David, a man nicknamed "Horseface" (later identified as Aurelio Muro), Roberto, Arturo, and two other people he did not know.

being thrown near his work area but that he was not struck by any objects. Escandon then indicated he was going to leave and Ed Simovich told him that if he left he could be subject to disciplinary action. He then instructed Escandon that if he experienced any further problems to report them to Ernesto Lopez who would tell either Art Van Haasen or Ed Simovich and they would investigate and do whatever could be done to correct the situation. Escandon agreed to that proposal and continued to work. When Escandon came at noontime with Cortez, he complained he had been threatened and he was leaving. Simovich stated he offered to go back across the street to inquire what was occurring and Escandon said no, he didn't want to go back, he was leaving. Ed Simovich then inquired if he was quitting and Escandon answered in the affirmative. He then gave Escandon a document to sign which

stated he was quitting. Escandon said he would not sign it. Ed Simovich did not say who acted as the interpreter or how he and Escandon communicated. Based on the previously-stated reasons and the language difficulties that were unexplained, Ed Simovich's testimony is not credited.[134]

On October 6, Respondent sent Heriberto Valenzuela a telegram telling him to report to work on October 9. The instructions contained the caveat, "By this offer of reinstatement we do not waive any of our rights or defenses we may have on any legal matters regarding your reinstatement."

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[134] Nestor Lopez's denial is also not credited based on demeanor, lack of clear recollection admitted hostility toward strikers, the fact that there was uncontroverted evidence that objects were thrown within the shops and the apparent concerted lack of attempts to preclude employees from doing so even though it was admittedly known that, particularly in the paint department, several incidents of this nature had occurred.

Valenzuela did report to work on October 9 and was taken by Rowe to the department overseen by foreman Bobby Charles Smith.

According to Valenzuela, when he returned to work, he talked to Bob Smith who then went to use the men's room, and while Valenzuela was waiting for Smith's return he was approached by six men, one of whom, Corona, was previously identified as "El Cuchillo,"[135] because he was armed with a knife. Another of these individuals was nicknamed "the groom," or "the boyfriend," identified as the brother of Larry Rincon. There were three other individuals whose names he did not know. The individual, whom he identified as "El Cuchillo" threatened to kill him if he continued working for the Company. At that time, Smith came out of the men's room and went to his office. Smith did

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[135] In Spanish, "El Cuchillo" is translated as "the knife."

not ask the group to disperse. After the discussion, Valenzuela went to Bob Smith to get his work assignment. During this talk with Smith, the individual he identified as "El Cuchillo" again threatened to kill him if he continued working at the Company, pointing his finger at Valenzuela. Valenzuela went to work and at about 10:10 that morning, an individual who was identified as the nephew of "the pigkiller,"[136] said he came looking for him. Valenzuela stated that he reported the incidents to Bob Smith who told him, "I can't do nothing." Valenzuela reported the incidents to the police. The policeman indicated to Valenzuela that since he was not struck, but merely threatened, that they could do nothing. Valenzuela understood the policeman to have instructed Ed Simovich to go back to Valenzuela's work station to help

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[136] The individual is otherwise unidentified.

calm the situation. When Valenzuela asked Ed Simovich to comply with the police officer's instructions, Valenzuela asserts that Ed Simovich said he could not fix anything, that he would accompany him but he could not remedy the situation. After insisting three times, Valenzuela asserts Ed Simovich took him to the work station of Roberto Corona, Valenzuela offered Corona his hand, Corona said no way, and then Valenzuela told Simovich that he was to observe the attitude and Simovich replied that he could not rectify or change matters. Subsequently, on the afternoon of October 6, Corona again confronted Valenzuela and challenged him to a fignt but the matter was resolved between them amicably.

Then on October 14, at around 7:30 as he was commencing work, he was surrounded by about 14 individuals. He identified them by nickname primarily as follows: "Someone

who takes care of pigs"; "the nephew"; a man, Nieblas; a man named Rene; and others whose names he could not remember. He identified the "one who takes of pigs" as coming from the paint department; "the nephew" as working in the machine department; and Nieblas as a painter.[137] The individual identified as "the nephew" threatened him that if he did not leave, "he knew what would happen to him." At that time, Bobby Smith walked by so Valenzuela told the people in English to get out of here, this is my work station and he did not want to be bothered. Only then did Bobby Smith instruct the individuals surrounding him to go to their work places.

Later that day, Valenzuela went to Ed Simovich's office and informed him what occurred and Ed Simovich returned with him immediately but stated he could not do

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[137] Arturo Nieblas worked at that time in the paint department.

anything. Valenzuela then called Zamora who telephoned the police. He was told that a detective was being dispatched but he never saw the detective. Valenzuela then met again with Ed Simovich as well as Tom., Jr. and Bob Smith explaining in detail what had occurred, and Ed Simovich again indicated he could not do anything, inquiring of Valenzuela what he wanted of management. Valenzuela indicated that Simovich expressed hesitancy in returning to the work site to speak to the six people the preceding day who had threatened him. He also stated Ed Simovich could instruct the employees that they should not bother him. He went back to work and Ed Simovich said Bob Smith was going to take care of everything and that the Company would not his [sic] the coworkers bother him.

After he returned to work, he was struck on the back with several pieces of metal rolled in tape. Valenzuela informed

Bobby Smith who said he could not do anything. Valenzuela asserts that he told both Smith and Ed Simovich that he was being hit by objects, steel plugs and steel nuts, on October 29, but they said they could not do anything. According to Valenzuela, Ed Simovich told him that if the situation continued, he would be moved to another department but he was never so moved. The only person on October 29 who could have thrown the objects was an individual named Bill Plummer. Ed Simovich talked to Plummer and said that it couldn't have been Plummer but Plummer did state to Valenzuela that it was because of the picketing, Valenzuela and the ____ing union," that the company did not give him [Plummer] anything. On December 19, Valenzuela was struck on the back of the head with a steel object and was taken to the hospital. Upon his return to work, Plummer saw him and told him that the next time he

would break his " ___ing brains." Valenzuela was not able to resume work as a result of the injury. Respondent sent him three mailgrams, requesting documentation for the reasons for his absence from work.[138] Valenzuela got from his doctor a letter on January 16 informing the Company that he was on a medical leave of absence from December 8 to January 2, 1981. The letter had the incorrect last name but he stated he was in the process of obtaining another letter with the correct information. There was no evidence probative of disingenuousness on Valenzuela's behalf with regard to his disability and his demeanor while testifying after being struck in the head demonstrated that he was suffering from vertigo, and presented a great contrast from his demeanor prior to the injury.

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[138] The mailgrams were sent on December 17, January 7, 1981 and January 14, 1981.

Ed Simovich corroborated Valenzuela's statement that he called the police the first or second day he was back at work and that he did report a number of problems. With regard to the police officers, Simovich stated that the officer and Valenzuela spoke in Spanish and then the officer told him that Valenzuela claims several people threatened him. Ed Simovich stated he then asked the officer if they harmed him or touched him and he was told no. The police officer then said he could not do anything because no crime had been committed. Ed Simovich then volunteered to take Valenzuela back to work and Valenzuela gave him the name of one individual who had threatened him, Roberto Corona. He took Valenzuela to see Roberto Corona and asked if he had threatened him and Corona denied ever threatening him. Valenzuela wanted to shake his hand, but Corona would not shake his

hand. Valenzuela told Simovich to examine Corona's attitude and Simovich said he could not force people to like him, all he could do was keep people out of his working area to permit him to do the job. There is no indication that Ed Simovich or any other supervisor instructed Corona to stay away from Valenzuela. Simovich then recalled that in December a secretary called him and told him to come downstairs, that Valenzuela wanted to talk to him. Valenzuela showed him a bolt or a cylinderplug and told him as he was welding someone had thrown the object which struck him on the back of the head. Simovich stated he didn't see any blood after inspecting the asserted point of impact. Valenzuela said he wanted to see a doctor, he didn't feel well. Valenzuela also said he did not see who threw the object. Valenzuela went to see his own doctor and Simovich later got a slip from the doctor when Valenzuela

returned to work on December 19. Valenzuela then requested to leave to see another doctor and showed Simovich a paper indicating he had an appointment. When he returned on October [sic] 19, Valenzuela also told Ed Simovich that Bill Plummer had threatened him that day. Ed Simovich asked Plummer if he threatened Valenzuela and Plummer denied it. Smith claimed to Ed Simovich that he did not see anything. No warnings were evidently given to Plummer.

Smith admitted that by the second day of his return to work, Valenzuela had complained about objects being thrown at him. Valenzuela did not say what was being thrown at him and Smith did not inquire. He believes Valenzuela requested permission to go to the office which was granted. He returned in about 45 minutes with Ed Simovich. Ed Simovich indicated they were happy to have Valenzuela back, that he had a

job with Respondent as long as he wished but that the problem of individuals bothering or harassing him was difficult, that they could not stay with him at all times to keep everybody away from him.

The following day Smith said he came in a little late in the morning and saw 10 or 12 individuals in the area of the mast department talking loudly to Valenzuela. Smith stated he told them to disperse. He told them he would not countenance that type of activity and they dispersed. Smith did not apparently ascertain certain what was occuring, who the individuals were, what was being said or behave in a manner bespeaking concern for Valenzuela's wellbeing. He admitted that the individuals involved did not work in the mast department and further, after at first stating that they did not look like they were angry, said that hey were speaking in Spanish, shaking their fists at

Valenzuela, repeating actions found objectionable by Respondent when striking employees so behaved while they were on the picket line. Eventually, he did admit that they looked angry. He admitted he did not ask for any names, that he only told them to disperse and not to come back. He did not report the incident to Ed Simovich. This demonstrated lack of candor, lack of concern and inconsistent testimony, cojoined with a disingenuous demeanor lead me to discredit Smith's testimony.

The next day or two Valenzuela again reported to Smith that individuals were throwing objects at him and he showed him a box full of nuts and bolts. About an hour later they met with Ed Simovich who told Valenzuela that they would do everything they could to permit him to work in that area, that he was more than welcome to work there but they could not keep everyone away from

him because of the common restrooms and the fact that people have to come and go to pick up and deliver parts and other items. According to Smith, he had no knowledge of other employees previously complaining about objects being thrown at them. He stated he was concerned when Valenzuela reported objects were thrown at him but admitted he did not inquire what the objects thrown were or who were the perpetrators. Smith said he waits for the individual to volunteer the information.[139]

Smith was asked if he didn't think it was part of his responsibility to investigate the situation and he replied he did look into it and saw no one in the area and informed everyone that they were not

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[139] This does not seem credible in light of Simovich's representation that they would do everything they could to assure his safe working situation but could not be with him all the time.

supposed to throw things, which was a standing rule in the department. He stated about 2 years prior to these incidents a notice was posted informing the employees that they were not to throw objects in the department. He said he was concerned over the incidents but he could not be there 100 percent of the time. Smith and Simovich's management actions to protect Valenzuela are contrasted against the manner in which they took great umbrage to any threats or ostensible threats made by strikers against repIacement employees.

Another returning striker that experienced harassment on the day of his return was Salvador Elizarraras. According to Elizarraras, when he went to work on May 27, the first day he was told to report after being offered reinstatement, a baseball and several metal objects were thrown at him. A bottle full of water hit him in the left

shoulder, he stated, but he actually pointed to the collarbone area. He did not see the employees who threw the metal objects but he did see Arturo Nieblas throw something at him that hit him on the back of the knee on the left leg. He reported the incidents to Dick Rowe, and Peterson assertedly smiled when firecrackers were thrown at him. After being told about the incidents, Rowe assertedly said "there was nothing he could do about it" and sent Elizarraras to the office.

Elizarraras then talked to Ed Simovich describing the difficulties he was experiencing with his coworkers and Ed Simovich assertedly inquired if he was willing to accept those conditions of employment for "there was nothing he could do about it." After Elizarraras talked to Simovich he went home informing Simovich that he wanted to work for Champ but until the conditions were more conducive, he could not

remain there. Simovich said he was sorry, but there was no work for him. Based on demeanor, clarity of recollection and the inherent consistency of the testimony, as well as the consistency of his testimony with the testimony with other returning strikers, the version of the events given by Salvador Elizarraras is credited. It is also noted that Elizarraras informed both Rowe and Simovich that one of the asserted perpetrators of throwing objects was Arturo Nieblas who threw an object that struck him. Yet again there was no disciplining of Arturo Nieblas; the repeated allegations of wrongdoing by Arturo Nieblas evidently made no impression on any of Respondent's representatives.

Similarly, Tommy Vargas reported to work May 15. Shortly after starting work on May 27, had firecrackers thrown at him and he was hit by a piece of iron on the back. The

piece of iron was described as being about three inches long. He did not see who threw the objects at him but reported the incident to his foreman, Art Van Haasen. He also reported the incidents to Ed Simovich. Another incident was that some employees approached him and made profane statements to him. After speaking to Ed Simovich about these incidents, Simovich assertedly replied that Vargas was to return to work. Vargas then asked if Simovich would transfer him to another location. Ed Simovich replied no, that the problem would only last a couple of weeks and then would be over. Vargas then stated that his boss, Tom [Simovich] arrived, heard what Ed Simovich was telling him and then they laughed. Vargas said he would think about going back to his place of work but he did not return, he left the plant. Neither Ed Simovich nor Art Van Haasen offered to return to his work site with him.

He told Van Haasen and Ed Simovich that he was going to move his car, but instead of moving his car he went home; he did not punch out. He then discussed the incidents with Zamora, inquiring whether he should return to the plant. Based on demeanor, consistency with other incidents described by the other sequestered witnesses, and the inherent consistency and clarity of recollection lead me to credit Vargas's version of the incidents.

Erasmo Salazar went back to work on May 22 in the paint department. He described the foreman of that department as being Nestor Lopez who was present when objects were thrown at him. Lopez assertedly told Salazar that he was just to take care of himself. Lopez did not speak to any of the employees about objects being thrown at Salazar. The next day, May 23, the employees continued throwing objects at him. He did

not see who threw the objects. He talked to Ed Simovich on that day after being approached by a group of employees who told him that they did not want to see him working amicably after what he had done while on the picket line. He indicated that they threatened him and that they first told him that they were speaking to him with words and if he did not understand what they wanted they would behave in another manner. He did not know the individuals by name, that there were approximately 8 to 10 employees in the group.

It was shortly after this incident that he talked to Ed Simovich. Simovich had walked over and asked how he was. Salazar indicated he was experiencing problems. A group of people had gotten together and threatened him, that he could not work under those circumstances and that was his last day of work. Ed Simovich told him not to pay any

attention to the individuals who threatened him, that they were resentful because of what had occurred during the picketing. He did not tell Simovich objects had been thrown at him, only that he had been bothered. When he returned to work, he said Ernesto Lopez saw what wash appening and told Salazar on May 23 that he was to be careful to take care of imself. Neither Nestor Lopez or Ed Simovich offered to solve the problems Erasmo Salazar was experiencing. Erasmo Salazar's testimony is credited based on demeanor, inherent consistency and corroboration by other witnesses who experienced similar difficulties.

Salvador Garcia returned to work on May 23 and on the name day also experienced objects being thrown at him, paper balls and metal objects. One object was thrown at him by Arturo Nieblas which he described as a very large metal nut, approximately 2 to 3 inches in diameter, which struck him on the

left shoulder. Nieblas admitted to him that he threw the object, stating that he could hit him and beat him and do whatever he wanted and that there nothing that Garcia could do about it. After that incident, Garcia talked to Ed Simovich and an individual he described only as an older man. He described how he was being harassed and pointed out some of the individuals who were harassing him. One was Roberto Corona.[140] Garcia told Ed Simovich that Nieblas was the individual responsible for throwing the nut at him and that he did give the nut to the police when he went to file a charge with the police that afternoon. Ed Simovich assertedly did not pay any attention to Garcia. When Simovich and the other

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[140] It should be noted that Corona assertedly was an individual that threatened Valenzuela, so it was not an isolated incident involving either Nieblas or Corona and one returning striker.

individual identified as the older American left, he was approached by between 10 and 15 employees. Nestor Lopez was present but did not do anything. At this point, Nieblas was one of the primary employees making threats. The individuals surrounding him used profanity toward him, cursing and threatening him, stating "that I was nothing, that I was no one there, that any time they felt like it they could do and undo with me. And if I wanted to work there, I had to stand everything and they were going to treat me any way they felt like it." The individuals identified as making those comments were Arturo Nieblas, Rene Gonzales and others he could not name. After this incident, he asked Ernesto Lopez why he hadn't done anything to protect him, that he knew that Garcia was not "the fighting type." Ernesto Lopez, who Garcia identified as a foreman, told him that it was better that he leave so

that he would not be hit. At that point, Garcia left the plant. This evidence was not presented to show constructive discharge but to show animus by the Respondent toward strikers. The similarity of the incidents, the similarity in the actions of the Company, demeanor and clarity of recollection lead me to credit Garcia's testimony.

Similarly, the testimony of Manuel Cruz that he experienced objects being thrown at him is credited for the same reasons. Cruz reported to work on May 19 and almost immediately thereafter encountered difficulties, people were throwing iron objects at him which struck him all over his body. He saw one person throw an object and that was Arturo Nieblas. He reported the matter to Bob Peterson and told Peterson that he could describe the individuals since he did not know Nieblas' name. Peterson said he could not do anything so Cruz punched out,

left work and went home. When he arrived home, he placed a call to Ed Simovich but Ed Simovich was not there.

Ed Simovich returned his call the same day and told him to come back to work. Cruz described to Ed Simovich the difficulties he was experiencing with he employees throwing objects at him. Ed Simovich did not comment on the problem, he just said for him to return to work. Cruz assertedly responded that if Simovich did not stop the employees from throwing objects at him, he would not return to work. Ed Simovich then told him that if he did not return to work, he has fired. Cruz reported for work on May 19, 1980 pursuant to the instructions in the telegram, punched his timecard at 7:15 a.m. and punched out at 7:45 am.

On October 28, Respondent sent a telegram to Javier Olague instructing him to report to work on October 30, 1980. This

telegram also contained the statement, "By this offer of reinstatement we do not waive any of our rights or defenses we may have on any legal matters regarding your reinstatement." Olague did report to work and told Dan Rowe and Dan Krivosha that he didn't have his tools, when Ed Simovich came to the shop and they said he didn't have hiks [sic] tools, he said it would take him about 2 weeks to get his tools together. Olague admitted that he had another job and wanted to give them 2 weeks notice but did not so inform Respondent. Olague did indicate that he had another job and did not know whether he wanted to quit or not but he did not have any tools that were needed to work at Champ. Ed Simovich offered to finance the acquisition of the tools and have Olague pay back the Company in installments through deductions from his paycheck. Olague did not accept the offer. He asked if he could be

loaned tools and Krivosha would not inquire if anyone would loan him tools. The Company did arrange however to get the tools for him by direct purchase and have payroll deduction if he wanted to return to work the next morning. Olague, according to Ed Simovich, said he didn't decide whether he wanted to return or not, he would let them know later. He did not return or otherwise contact the Company and was sent the following letter on November 5, 1980:

> You were instructed by mailgram to report back to work on October 30, 1980. You told the production superintendent, Dick Rowe, on October 30 that you needed a few days to gather your tools and would report for work on November 3. You told Ed Simovich by phone conversation on November 3 that you had not yet decided if you wanted to quit your present job and return to Champ. You

stated that if you did not report for work the morning of November 4, you would not be returning to Champ. We must assume by your absence yesterday that you are voluntarily terminating your employment with Champ Corporation. The payroll department will be notified of your termination. They will be forwarding to you any monies due to you.

Ed Simovich's version of the events regarding Olague is credited:[141] Olague admitted that he had a conversation with Ed Simovich wherein Simovich offered to buy tools for him. Olague also indicated that

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[141] The crediting of only portions of Ed Simovich's testimony is required under the circumstances of this case which does not require the adoption or rejection of his entire testimony. Carolina Canners, Inc., 213 NLRB 37. "Nothing is more common than to believe some and not all of what a witness says." Edwards Transportation Company, 187 NLRB 3-4, enfd. curia 437 F.2d 502 (C.A. 5, 1971).

the 5 additional days were insufficient, that he would need at least 2 weeks because he had to give notice to the company he was working at. It also places into doubt his statement that he returned to work at the Company ready, willing and able to go to work since he wanted to give 2 weeks' notice. He then admitted that he did not tell Ed Simovich that the reason he wanted an extension of time to get his tools was because he wanted to give 2 weeks' notice to his then-current employer. This disingenuousness with the Employer in asking for a delay to return to work warrants crediting Respondent's rendition of the events which Olague substantially corroborates.

9. Request for Information

On June 6, 1980, Fenton, attorney for the Union in this instant roceeding, wrote Respondent as follows:

You have already been asked for the names, dates of hire, rates of pay and classifications of all bargaining unit employees in Mr. Gazzigli's letter of May 12, 1980. Additionally, also provide for such employee the dates of any breaks in service, the job duties performed, and the department in which each such employee works and has previously worked and inclusive dates of such job duties and department placements.

Ed Simovich admitted that in either May or June of 1980 the Union sent respondent a letter requesting a copy of employees job descriptions. He also stated that prior to receipt of the letter he recalled the topic being mentioned in several negotiating sessions but believed that the issue had been exhausted. According to Ed Simovich, the Union was informed during the negotiating

sessions that the Company did not have any job descriptions or work area descriptions. They had not formalized most of their job descriptions nor were there formalized departments. The matter was handled in an informal manner.

It was through negotiations, according to Ed Simovich, that the job descriptions and departments became formalized to a degree. The Union committee did propose job classifications and finally the agreed upon employee job classifications. He stated that the Company never supplied the Union with a job description because the Company never had one. He believes Hoy answered the inquiry. Pursuant to a request from Counsel for General Counsel, sometime after he gave his deposition in June and prior to the deposition of July 7, the Company prepared a job description for all individual employees. Ed Simovich prepared

the description in response, as previously stated, to a request from Counsel for General Counsel by trying to figure out what each employee was doing prior to the strike. At times he consulted with foremen. In sum, it is Respondent's position that no information about job duties was provided to the Union because none was existent at the time the request was made. The material prepared to meet the request of Counsel for General Counsel was not considered an official record of the Company and was not to be accepted as a working document for Company purposes.

V. Analysis and Conclusions

Alleged Violations of Section 8(a)(1)

As indicated above, it is found that on October 17, T. Simovich threatened to have striking employees fired when "all they

were doing was walking the picket line."[142] T. Simovich, on November 27, 1979, threatened to have Solis arrested for assertedly threatening to "blow up . . . with a bomb" the vehicle of a prospective replacement employee.[143] On December 15, 1979, the credited evidence is that T. Simovich got very angry because the picketers successfully dissuaded a truckdriver from picking up a forklift truck for a customer, told all picketers present that they were fired, pointed at Solis and said, "Solis, I guarantee you, I'm going to send you to jail . . ." On January 8, 1980, T. Simovich again, without adequate justification, threatened Solis with arrest for attempting

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[142] See the testimony of Jose Naranjo, Ricky Craft and Steve Baugh.

[143] As indicated above, Solis was arrested for allegedly making the threat but the charges were dismissed.

in a peaceable manner to dissuade a replacement employee from crossing the picket line.

With the exception of the November incident, there was no reason advanced for threatening to fire the picketers or to have them arrested. The making of these threats while they were peacefully picketing is a coercive threat in violation of Section 8(a)(1) of the Act. See Cutting, Incorporated, 255 NLRB No. 76 (1981).

On November 2, 1979, T. Simovich offered M. Avalos and Ernesto Franco increased benefits if they abandoned the strike and returned to work. Also, although not alleged in the complaint as a violation, T. Simovich indicated that only certain striking employees would be reinstated.[144]

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[144] The failure to allege this statement as a violation of the Act, under the circumtances of this case, precludes deciding the issue on the merits for it cannot be found that the question was fully (continued...)

The offer of increased benefits to abandon their participation in protected activity is clearly a violation of Section 8(a)(1) of the Act. See Pace Oldsmobile, Inc., 256 NLRB No. 111 (1981). This action was also alleged by direct bargaining with employees of the unit in violation of Section 8(a)(5) and (1) of the Act. Since General Counsel seems to have abandoned this portion of the allegation and the remedy is the same, it is unnecessary to consider whether Section 8(a)(5) was violated by this action.

Based on the credited testimony, it is found that Larsen, a supervisor, did attempt to scare picketers by driving a loaded forklift through the picket line in a threatening manner, where there was no showing that the employee strikers were

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[144](...continued)
and fairly tried.

unduly abusive,[145] or acted in any other manner warranting or excusing Larsen's actions, which are therefore found to be violative of Section 8(a)(1) of the Act. See Arcadia Foods, Inc., 254 NLRB No. 128 (1981).

Alleged Unlawful Discharges During the Strike

As the Administrative Law Judge stated in Laredo Coca-Cola Bottling Company, 258 NLRB No. 69 (1981):

> The Supreme Court has long recognized that actions taken against strikers are inherently destructive of Section 7 rights. N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 33 (1967). In all cases involving either the discharge of or the refusal to reinstate strikers for having engaged in alleged acts of misconduct, ". . . the burden of

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[145] As will be discussed in greater detail below, there is a certain amount of "animal exuberance" deemed to be expected picket line conduct.

proving discrimination is that of the General Counsel." Rubin Bros. Footwear, Inc., 99 NLRB 610, 611. Accordingly, the General Counsel must first establish that an individual was, in fact, a striker and that an employer took some action against him for conduct while said Individual engaged in the strike. At that point, the burden shifts to the Respondent which must prove that it entertained an honest belief that the striking employees have engaged in misconduct. Such constitutes an adequate defense to a charge of discrimination in refusing to reinstate strikers except where the General Counsel affirmatively establishes that the employees did not, in fact, engage in such misconduct or where the conduct in question was not ". . . so flagrant or egregious as to require subordination

of the employees' protected rights in order to vindicate the broader interest of society as a whole." Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. N.L.R.B., 389 F.2d 553 (D.C. Cir. 1968); Gold Kist, Inc., 245 NLRB 1095; Birch Tree Number One Incorporated, d/b/a Birch View Manor, 243 NLRB 495; Co-Con, Inc., 238 NLRB 283; Rubin Bros., supra. Once the General Counsel has established that the misconduct did not occur, the burden shifts to the respondent to rebut the denials. Gold Kist, Inc., supra.

The previously credited testimony leads to a finding that Tom Simovich discharged Baugh and Naranjo on October 17, 1979 while they were lawfully picketing at or near Respondent's place of business. There

was no allegation that Baugh and Naranjo were boisterous, obstreperous or acted in any other manner which explained or warranted the decision to discharge these striking employees on October 17. Further, there is no basis to find that Respondent has a reasonably based belief that these strikers acted in a manner which, independent of unlawful animus, would result in the decision to discharge these employees. Accordingly, it is found that these termiminations from employment were based upon a discriminatory motive, in violation of Section 8(a)(3) and (1) of the Act.[146] There was no showing that these employees were replaced prior to

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[146] The discharge of lawfully picketing strikers constitutes a prima facie showing of discriminatory motive. Respondent has failed to rebut the showing with evidence that the decision would be the same absent the protected activity. See Wright Line, A Division of Wright Line, 251 NLRB 1083 (1980) and Limestone Apparel Corp, 255 NLRB No. 101 (1981).

their discharge. As previously noted, Respondent offered to reinstate all striking employees if they returned to work on or before November 3, 1979. Therefore, there is no clear showing that any employees were deemed to be permanently replaced prior to November 3, 1979.

On both October 25 and 31, as found above, Respondent stated five or six employees[147] would not be reinstated for they were considered troublemakers or agitators. Baugh was accused of being extremely vocal. Baugh, Solis, Ortiz and Gutierrez were accused of using abusive language. There were no specific allegations regarding the other individuals listed by the Company as of October 25 or 31. In general,

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[147] Baugh, Valenzuela, Solis, Gutierrez and Ortiz were all that T. Simovichi could recall. The sixth employee's name was not recalled by any of the witnesses.

there was the previously described extensive violence, the shouting and cursing, and the blocking of ingress and egress to the property. Gazzigli insisted that all strikers be reinstated upon consummation of the contract. This demand became known to the union membership on November 5. Counsel for General Counsel asserts that Respondent's advising Gazzigli that the Company would not reinstate those individuals was advising him that they were being terminated without adequate justification is a violation of Section 8(a)(3) and (1) of the Act. Respondent asserts the basis for the discharges is that these employees' picket line activities constituted misconduct of a nature sufficient to warrant discharge.

Misconduct sufficient to warrant discharge is not exclusively open to self-determination by employers, particularly in strike situations where the Board and

courts recognize the "strong emotions" generated by union activity. Twilight Haven, Incorporated, 235 NLRB 1337 (1978). "Meaningful protection in this situation must require that relatively minor incidents, such as name calling or somewhat ambiguous or veiled threats do not remove the Act's protection from the perpetrator, or suffice to legitimatize his discharge." Corriveau & Routhier Cement Block, Inc., 171 NLRB 787, 788 (1968), enf. denied in circumstances presented, 410 F.2d 341 (C.A. 1, 1969).

That these employees were to be disciplined while Freddie Vallejos[148] A. Nieblas, N. Lopez[149] and others were not disciplined for engaging or allegedly engaging in criminal activity were

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[148] Vallejos was arrested for the fight with Rodriguez and for the ax incident.

[149] These employees, along with others, threatened and assertedly physically struck returning strikers.

unexplained distinctions in treatment between strikers and nonstrikers. Also, as found above, employees who were not on strike engaged in profane and insulting verbiage as did the striking employees. The more stringent application of plant policies to strikers, when the only distinction apparent is whether the perpetrators were strikers or not, establishes a pattern of discipline based upon discriminatory motives in violation of Section 8(a)(3) and (1) of the Act. See Upland Freight Lines, Inc., 209 NLRB 165 (1974), enf. 527 F.2d 766 (C.A. 9, 1976); and Keller Manufacturing Company, Inc., 237 NLRB 712 (1978). Respondent has failed to explain this disparate treatment of not reinstating certain employees while retaining as employees, without any disciplinary action, individuals found to have engaged in similar activities. Accordingly, it is concluded that Respondent

violated Section 8(a)(3) and (1) of the Act by disqualifying these five employees from reinstatement. Steve Baugh saw the list and, on November 5, at a union meeting notified the attending membership of the Company's position.

Similarly, it is found that T. Simovich told F. Zamora that he would never work for Champ again. This statement, as is the case of the other asserted firings discussed above, despite the subsequent offer of October 30 of reinstatement, are found to be declarations which reasonably lead the employees to believe that they have been discharged. See Famous Supply Company, Inc., 254 NLRB No. 91 (1981), which applies the test applied in Ridgeway Trucking Co., 243 NLRB 1048 (1979), quoting from N.L.R.B. v. Trumbull Asphalt Company of Delaware, 327 F.2d 841, 843 (8th Cir. 1962), as follows:

> The fact of discharge does not depend on the use of formal words of firing . . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated.

Statements to Baugh and Naranjo that they would "never be back," as previously found, informing Gazzigli that six employees would not be reinstated and telling Zamora that he would never work for Respondent again are all words and actions which "would logically lead a prudent person to believe his tenure has been terminated."

It is therefore found that General Counsel has made a prima facie showing that these picketers' protected conduct was the motivating factor in the Employer's decision. In sum, it is concluded that these actions were discharges based on discriminatory motives and not actions based upon good faith

beliefs that the discharged strikers engaged in such egregious acts to warrant discharge. Hence, these discharges are in violation of Section 8(a)(3) and (1) of the Act.

Respondent is found to have exhibited union animus as early as October 3, 1979, when, according to the credited testimony of Deputy Stead, T. Simovich classified a group of employees which he characterized as potential troublemakers. The source of the trouble, Stead was told by T. Simovich, was the attempt by the Union to organize the employees of Champ Corporation.

According to the testimony of Deputy Terhorst, he had numerous conversations with several supervisors at Champ Corporation and testified that T. Simovich was unhappy with the strike. "He didn't want to see it happen. In the same vein, he also was not happy with having to have a union shop." T. Simovich told Terhorst, whose

testimony is credited,[150] that "he didn't want the union in." Tom Simovich testified, as previously quoted:

> I've had a harmonious plant. We know one thing and if you don't know it now, you never will: The object of the Union is to get a closed shop and dues paid. If they don't get that -- that's what they're after.
>
> If they don't get that, the only left is destroy to submission -- til you submit. That's a rule of thumb. And I know that.

T. Simovich was understandably upset at the events which occurred during the strike, and subsequently in his testimony tried to ameliorate the impact of the above-quoted testimony by asserting that he did not care

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[150] This finding is based on clarity of recall, the impact of an adverse admission and corroboration in T. Simovich's own testimony.

if "all my people belong to a union . . . [or] . . . if a man wants to walk a picket line all day long. . ." This attempt to disavow any animus toward the Union is not credited, based on the lack of candor, the credited testimony of Stead and Terhorst wherein he admitted union animus, and inherent probabilities.

Alleged Violations of Section 8(a)(5) and (1) of the Act Alleged Changes in Terms and Conditions of Employment Without Negotiations

As found hereinabove, based on the uncontroverted evidence of record, Respondent, during the strike, added October 24, 25 and 26 as paid days off, 1979, and added paid holidays around Thanksgiving, November 23 and Christmas, December 24, 1979. The Respondent posted notices on November 19 and December 17, respectively, to inform the employees that they would receive eight hours wages for

November 23 and December 24, if they worked the days before the new holidays. The employees were not given the option to work and of these new days off Gazzigli inquired of Respondent, by letter dated February 19, 1980 addressed to Hoy, if the nonstriking employees were paid for any additional holidays. In a reply dated March 12, Hoy informed Gazzigli that the requested information was within the scope of the unfair labor practice charges filed by the Union with the Board and the information would be forwarded to the Board. The complaint alleges that these actions violated Section 8(a)(5) and (1) of the Act for they constitute a unilateral alteration of existent terms and conditions of employment without prior notification to, or consultation with, the Union.

Respondent asserts that the decision to close the plant for 3 days in

October was an attempt to provide a "cooling off" period during a violent strike, where the principal owner and operating officer was informed by a guard that there was a contract" out to murder him, the violence attendant to the strike appeared to be escalating and Company efforts to have the Union calm the strikers were unsuccessful. Therefore, Respondent argues that the 3-day plant closure, while paying employees for the 8 hours on each of those days, was necessary to meet an emergency situation. Respondent cited Sign and Pictorial Union v. N.L.R.B., 419 F.2d 726 (D.C. Cir., 1969), which is cited at page 736, Hawaii Meat Co. v. N.L.R.B., 321 F.2d 379, 400 (C.A. 9, 1963) for the proposition that "A struck employer clearly has the right to keep his business operating, and often emergency situations justify emergency responses, particularly in the midst of a strike."

The additional closures in November and December, Respondent asserts, were necessitated by the need to rest the leadmen and foremen of the Company who, because of the strike, were required to perform additional duties and work longer hours, and they were extremely tired. The decision was assertedly based on a determination that continued operation with these supervisory employees would be unsafe. Respondent's argument concludes that all plant closings were motivated by special circumstances. This claim is somewhat controverted by the Company's November 19, 1979 notice to all nonstriking employees which indicated that the additional November holiday with pay was in part an "expression of thanks to employees who continued to work for the company." The granting of the additional holidays around Thanksgiving Day was never the subject of

negotiations between the Company and the Union.

While Respondent argues that the October, November and December plant closures with pay for most of the employees who were not on strike were lawfully based due to emergency situations, the evidence does not support the claim. [151] T. Simovich admitted that he did not notify the Union he was going to close the plant down for 3 days in October and for 4 days in November because he "did not think it was any of their business." This basis for the Company's actions is more credible since E. Simovich, in his affidavit, did not mention the alleged threat upon his father's life as a basis for the decision to close the plant and pay the employees for the days off. Furthermore, the

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[151] Thereis no assertion that an impasse was reached prior to Respondent's implementing the added vacation days. See Winn-Dixie Stores, Inc., 243 NLRB 972 (1979).

granting of an additional holiday during Christmas was a subject of negotiations early in December, prior to the Company granting the December holidays, and the Union refused to agree to the proposal because the parties had not yet commenced bargaining about economic issues.[152]

Normally, once a matter is raised in negotiations the employer may institute the change. However, here the offer to increase benefits during negotiations disputes the reason Respondent claims as the moving force behind its decision, a desire to meet some transient or temporary emergency. Rather, the proposal during negotiations demonstrates a design to permanently alter

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[152] No party asserts, nor will the record support, a claim that the decision to close the plant these additional days was economically motivated. See N.L.R.B. v. Katz, 369 U.S. 736, 748 (1962) and Puerto Rico Telephone Co. v. N.L.R.B., 359 F.2d 983, 987 (C.A. 1, 1967).

vacation benefits, thus the Employer was obligated to notify and bargain with the Union. It only bargained about one holiday, the additional day for Christmas. Also, the permanent nature of the proposal, particularly regarding the November and December holidays, demonstrates that the action was not a temporary reaction to an emergency situation justifying or excusing its conduct. Contrast Sign and Pictorial Union Local 1175, B. of P., D. & P. v. N.L.R.B., 419 F.2d 726 (1969).

The Employer has a duty to bargain with the Union during a lawful strike. To permit the Employer to refrain from informing the Union and negotiate about a benefit which is a mandatory subject of bargaining would completely undermine the Union's self-help vehicle--the strike--and hence undermine the bargaining process. The raising of an economic issue out of order, and implementing

the benefit after the Union rejected the proposal under the circumstances of this case, cannot be found to be good faith bargaining. That this was Respondent's intent is demonstrated by its failure to respond to the Union's request for information regarding whether the employees were paid during these shutdowns. Therefore, implementation of additional holidays without notifying and bargaining with the Union is in contravention of the provisions of Section 8(a)(5) and (1) of the Act.[153] Nor is

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17 Section 8(d) of the Act defines the parties' obligation to bargain, as pertinent:

> For the purposes of this section, to bargain collectively is for the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or through negotiations of an agreement on any question arising thereunder, and the execution of a written contract incorporating any agreement reached if (continued...)

Respondent relieved from its obligation to inform the Union and bargain about these additional benefits, the additional holidays, because of the asserted wrongdoing by the picketers. Assuming arguendo that the Union or the picketers were guilty of all the allegations made by the Company, the Respondent may not engage in unlawful conduct, the failure to bargain, with impunity. Phelps Dodge Copper Products Corporation, 101 NLRB 360, 367-368. That Respondent did meet and negotiate about the last holiday granted its employees with the Union indicates a waiver of this defense.

Accordingly, it is concluded that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting paid

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[153](...continued)
requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

holidays to unit employees without notifying or consulting with the Union in good faith. It is further found that by merely raising the issue of additional paid holidays prior to reaching discussion of economic issues, contrary to the parties' agreement regarding the order of bargaining, indicates undermining of the bargaining process rather than an attempt to establish meaningful notifications or consultations with the Union, thereby violating Section 8(a)(5) and (1) of the Act. See Autoprod., Inc., 223 NLRB 773 (1976) and Gerald F. Hinkle d/b/a Akron Novelty Manufacturing Company, 224 NLRB 998 (1976).

Alleged Refusal to Bargain Until Processing of Decertification Petition

It is uncontroverted that on or about March 4, 1980, Hoy informed the International Union's representative that the Company would not meet and participate in

further negotiations until such time as the Board completed processing the previously described decertification petition filed with the Board. Respondent asserts that it held a good faith doubt, based on the decertification petition, of the continuing majority status of the Union. As found in N.L.R.B. v. Grede Foundries, Inc., 104 Lrrm 2646, 89 LC 91, 12, 170 [sic] (D.C. Cir. 1980):

> An employer does not violate Section 8(a)(5) if its refusal to bargain is based on a good faith and reasonably grounded belief that the incumbent union no longer enjoys the support of a majority of the bargaining unit.

See, e.g., N.L.R.B. v. Alvin J. Bart and Co., 598 F.2d 1267, 1271 (2nd Cir. 1979); N.L.R.B. v. Top Manufacturing Co., 594 F.2d 223, 224 (9th Cir. 1979); Allied Industrial Workers v.

N.L.R.B., 476 F.2d 868, 881 (D.C. Cir. 1973). The court also stated:

> The naked showing that a decertification petition has been filed, with no indication of the number of signatories or other related matters, is an insufficient basis in fact for refusing to bargain since it establishes no more than that the petition was supported by the requisite 30% "showing of interest."

Allied Industrial Workers v. N.L.R.B., supra, 476 F.2d at 881-82. Accord, Retired Persons Pharmacy v. N.L.R.B., 519 F.2d 486, 490-91 (2d Cir. 1975); Rogers Mfg. Co. v. N.L.R.B., 486 F.2d 644, 647 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974).

Moreover, an employer that has itself orchestrated the union-ousting campaign cannot rely on the pendency of a decertification petition or the loss of majority status to justify its withdrawal of

recognition of, and refusal to bargain with the incumbent representative. N.L.R.B. v. Sky Wolf Sales, supra, 470 F.2d at 830; N.L.R.B. v. A.W. Thompson, Inc., supra, 449 F.2d at 1336-37. See also Medo Photo Supply Co., 321 U.S. 678, 687 (1944); N.L.R.B. v. Alterman Transport Lines, Inc., 587 F.2d 212, 228 (5th Cir. 1979).

See also Rogers Manufacturing Company v. N.L.R. B., 486 F.2d 644 (6th Cir. 1973), where it is stated: ". . . the mere filing of a decertification petition is of itself insufficient justification" for a refusal to bargain with a union, and Anthony Carilli, d/b/a Antonino's Restaurant, 246 NLRB 833 (1979). As held in Mark Twain Marine Industries, Inc., 254 NLRB No. 144 (1981), slip op. pg. 39:

> A respondent who withdraws recognition from an established union must do so on the basis of a reasonably based doubt as

to the continued majority status of that union and to be able to contend that it has the required good faith doubt, two prerequisites are necessary. First, the asserted doubt must be based on objective considerations and, second, such doubt must be raised in a context free of unfair labor practices. In the instant case, the record is replete with unfair labor practices which respondent initiated and which had a direct bearing on the question of majority status. Therefore, respondent is precluded from asserting any good faith doubt as to the union's majority status.

Coca-Cola Bottling Works, Inc., 186 NLRB 1050;[154] Guerdon Industries, Inc., 218 NLRB 658.

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[154] Affirmed as to the instant issue, modified as to the others, 46 F.2d 380.

Assuming *arguendo*, that Respondent's withdrawal of recognition was based on objective considerations, it was not accomplished in a context free of unfair labor practices. For example, the Company unilaterally announced and implemented increased benefits without prior notification or negotiations, discharged several employees because they were engaging in concerted protected activities, promised other benefits and threatened picketers with arrest for participating in a strike, all at times when Respondent had no reason to doubt the Union's majority representation status. Accordingly, it is concluded that Respondent was precluded on or about March 4, 1980, from asserting it held a reasonably based doubt of the Union's majority status as a reason for refusing to bargain, and thereby violated Section 8(a)(5) and (1) of the Act by its withdrawal of recognition.

Alleged Failure to Provide Information

The duty to bargain imposed upon an employer by Section 8(a)(5) of the Act includes the obligation to furnish to a union information necessary or relevant to the representative functions of the union. N.L.R.B. v. Acme Industrial Co., 385 U.S. 432. The Union's request for job descriptions of all bargaining unit employees and the dates that all such employees were laid off during the preceding 12 months are not contended to be irrelevant, insufficiently important, not needed, or that compliance would be in derogation of commitments, or privilege or confidentiality, or compliance would present a danger of misuse. See Columbus Products, 259 NLRB No. 29 (1981).

The standard for determining the relevance of information sought by a bargaining agent was stated in Westinghouse

Electric Corporation, 239 NLRB 106 (1978), as follows:

> It is well established that a labor organization, obligated to represent employees in a bargaining unit with respect to their terms and conditions of employment, is entitled to such information from the employer as may be relevant and reasonably necessary to the proper execution of that obligation.[155] The right to such information exists not only for the purpose of negotiating a contract, but also for the purpose of administering a collective- bargaining agreement. The employer's obligation, in either instance, is predicated upon the need of the union for such information in order

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[155] Vertol Division, Boeing Company, 182 NLRB 421 (1970); N.L.R.B. v. Whitin Machine Works, 217 F.2d 593 (4th Cir. 1954), cert. denied 349 U.S. 995 (1955).

to provide intelligent representation of the employees.[156] The test of the union's need for such information is simply a showing of "probability that the desired information was relevant, and that it would be of no use to the union in carrying out its statutory duties and responsibilities."[157] The union need not demonstrate that the information sought is certainly relevant or clearly dispositive of the basic negotiating or arbitration issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation on the part of an employer

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[156] F.W. Woolworth Co., 109 NLRB 1446, 1447 (1954), enfd. 352 U.S. 938 (1956).

[157] N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 437.

to provide it.[158] The appropriate standard in determining the potential relevance of information sought in aid of the bargaining agent's responsibility is a liberal discovery-type standard.[159]

In the circumstances present in this proceeding, the requested information has clear relevance to the Union's legitimate representational duties to ascertain entitlement of members to reinstatement after a strike.

Respondent argues that it had no written description of the job duties of the employees at the time of the request. This argument is deemed specious. As the Board

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[158] The Brooklyn Union Gas Company, 220 NLRB 189 (1975).

[159] Acme Industrial-Co., supra.

found in Safeway Stores, Inc., 252 NLRB 1323 (1980):

> In short, respondent's obligation Is to provide the information it has available, to compile it, or to give the union access to the records from which it can reasonably compile the information. And, if the production of the information ordered involved substantial costs, the parties may bargain over the allocation of these costs.

Citing Westinghouse Electric Corporation, supra and Food Employers Council, Inc., et al., 197 NLRB 651 (1972).

Ed Simovich compiled a description of the job duties of the unit employees pursuant to a subpoena of Counsel for General Counsel by consulting with various foremen and leadmen. Accordingly, it is found that the information was available and merely had to be compiled. This compilation was not

shown to have been exceedingly difficult or burdensome and, in fact, was first discussed during negotiations. The failure to compile and provide the information is found to be a violation of Section 8(a)(5) and (1) of the Act.

With regard to providing the dates and layoff of all unit employees for the 12 months preceding the requests, Respondent argues that a 3-month delay in providing the information was not unreasonable and, therefore, not violative of the Act. Citing Alkahn Silk Label Co., 193 NLRB 167 (1971). The Alkahn Silk case, ibid. is found inapplicable for therein it was determined that 13 days after the request, Respondent attempted to comply and that the fault was not reticence to supply the information but ineptness of the union representatives in describing what was wanted in a timely manner. In the instant proceeding, the

request was clear, no lack of understanding was claimed. The Respondent proffered no explanation for the delay. There is no claim that any of the requested information is confidential, sensitive or otherwise privileged from disclosure.

The striking employees, if they had a right to reinstatement, should not be delayed 3 months without some exculpatory circumstance and thus, it is concluded that the delay is unreasonable and is conduct violative of Section 8(a)(5) and (1) of the Act. See Crispo Cake Cone Co., Inc., 190 NLRB 352 (1971) and K & K Transportation Corp., Inc., 254 NLRB No. 87 (1981).

Whether the Strike was Converted to an Unfair Labor Practice Strike

There is no question that the strike, at its commencement, was an economic strike. Counsel for General Counsel asserts that on November 5, 1979, the strike was

converted to an unfair labor practice strike. Respondent asserts that it did not commit any unfair labor practices; therefore, conversion cannot be found.

As found above, on October 25, 1979, Respondent notified the Union that it, as part of the bargaining process, wished agreement by the Union that six striking employees would not be reinstated. This negotiating demand was found to be a violation of the Act and to have an inherently destructive effect upon employees' Section 7 rights.[160] During a subsequent negotiating session, it was found that Steve Baugh

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[160] The commission of this violation as well as the violations which preceded it would probably suffice to warrant finding conversion of the strike from an economic to an unfair labor practice strike. Gulf Envelope Company, 256 NLRB No. 58 (1981). However, it is not asserted that conversion occurred prior to November 5, 1979 and the issue of conversion of the strike prior to this date has not been fully and fairly tried, based on Respondent's reliance upon General Counsel's assertion.

learned of the bargaining demand. On November 5, during a union meeting, the matter was discussed and the membership voted that no striking employees would return to work until all employees, including those listed by Respondent, were reinstated by the Company. Thus, the record clearly establishes a causal nexus between Respondent's unfair labor practice and the decision to not end the strike and return to work until all striking employees were reinstated. It is therefore concluded that Respondent's unfair labor practices unduly prolonged the strike, thereby converting it to an unfair labor practice strike. Furthermore, Respondent's other alleged acts, including attempting to induce the employees to abandon the strike, threats of termination, threats of arrest, the unlawful discharges, refusal to bargain and the other

unfair labor practices found herein,[161] established "a pattern of conduct designed to both break the strike and to punish those who exercised their statutorily protected right to strike." Accordingly, I conclude that "[by]...the Respondent's action, the strike was converted from an economic to an unfair labor practice character...." Gulf Envelope Company, 256 NLRB No. 58 (1981), citing Pittsburgh and New England Trucking Co., 238 NLRB 1706 (1978). W.C. McQuaide, Inc., 237 NLRB 177 (1978). Robbins Company, 233 NLRB 549 (1977). It further found that the strike was initially converted from an economic strike to one of an unfair labor practice character as of November 5, 1979.

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[161] For example, the granting of additional holidays by Respondent specifically became of [sic] a "strike issue" by vote of the membership on December 31, 1979.

The Alleged Failure to Properly Reinstate the Striking Employees

The general rule regarding the reinstatement rights of striking employees is: An employer has a duty to reinstate all unfair labor practice strikers discharging, if necessary, replacements hired during the strike. N.L.R.B. v. Remington-Rand, 130 F.2d 919 (C.A. 2). An employer has a duty to reinstate economic strikers only if they have not been replaced, have not obtained other regular or substantially equivalent employment, and the employer refusing reinstatement showed such failure was due to legitimate and substantial business justification. N.L.R.B. v. Mackay Radio and Telegraph Co., 304 U.S. 333; N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 373 (1967). However, all economic and unfair labor practice strikers may lose their right to reinstatement by engaging in serious misconduct. The Union's offer on behalf of

the strikers is admittedly unconditional and sufficient to impose upon Respondent the ligation to reinstate the employees, consonant with applicable law. Therefore, the instant issue is whether any of the subject employees were economic or unfair labor practice strikers.

The Employees Allegedly Replaced Prior to Conversion of the Strike: November 5

Economic strikers continue to retain the right to fair treatment by the employer, as do nonstrikers and replacements. As the Supreme Court held in N.L.R.B. v. Fleetwood Trailers Co., Inc., 389 U.S. 375, 381 (1974):

> ...the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment." ...If and when a job for which the striker is qualified becomes available, he is entitled to an

offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications." N.L.R.B. v. Great Dane Trailers. [388 U.S. at 34].

As previously indicated, Respondent argues that 10 strikers fell into this category and they have been treated fairly and consistent with the principles of Laidlaw Corp., 171 NLRB 1366 (1968), enf. 414 F.2d 99 (C.A. 7, 1969), cert. den. U.S. 920 (1970), which provides:

> [E]conomic strikers who conditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain

his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Furthermore, "unless the employer who refuses to reinstate strikers show that his action was due to 'legitimate and substantial business justifications' [such as the hiring of permanent replacements during an economic strike in order to continue operations], he is guilty of an unfair labor practice.... The burden of proving justification is on the employer." N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 370-379 (1967). Cf. Cutting Incorporated, 255 NLRB No. 76 (1981).

Respondent has failed to sustain this burden of proving that Antonio Andrade, Alejandro Arroyo, Javier Arroyo, David Coronado, Ricky Craft, Enrique Figueroa, Lorenzo Franco, Mickey Lambright, Francisco

Zamora and Martiniano Rodriguez[162] had all been permanently replaced prior to November 4, 1979.

As previously found, the Company clearly did not consider these employees permanently replaced if they returned to work by November 2. There is no showing that the replacements for all these employees were hired prior to November 2. This finding is supported by Ed Simovich's testimony that Respondent not determine who was considered as permanently replaced until after the strike was over.[163] Therefore it is

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[162] Respondent discussed Rodriguez as belonging in both these categories in lieu of Jesus Valdez and the classification of employees charged with a crime. In fairness to the Company's position, the reinstatement rights of Martiniano Rodriguez will be considered in both sections.

[163] It is noted that the Board has long characterized letters sent to strikers similar in content to the one sent to the strikers on October 30 by Respondent as an "unlawful strikebreaking technique." (continued...)

concluded that Respondent failed to show that these strikers were permanently replaced by permanent employees prior to conversion of the strike on November 5 to an unfair labor practice strike. See Murray Products, Inc., 228 NLRB 268 (1977), aff. 584 F.2d 934 (1978). The Court in N.L.R.B. v. Murray Products, Inc., stated:

> Employees who are not working because of a labor dispute continue to be "employees" of their employer unless

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[163](...continued)
Kerrigan Iron Works, Inc., 108 NLRB 933, 938 (1954). See also Ekco Products Co., 117 NLRB 137 (1957); Pennsylvania Glass Sand Corporation, 172 NLRB 514 (1968), enforced sub nom. General Teamsters Local 992 v. N.L.R.B., 427 F.2d 582 (C.A. D.C., 1970); Cusano d/b/a American Shuffleboard Company v. N.L.R.B., 190 F.2d 898 (C.A. 3, 1951); N.L.R.B. v. Electric City Dyeing Co., 178 F.2d 980 (C.A. 3, 1950). Since there is no reference in the complaint to this activity, the issue is deemed not fully and fairly tried. However, the inconsistency in treatment of these strikers prior and subsequent to November 3 is indicative of unlawful motive.

they have obtained regular and substantially equivalent work elsewhere. National Labor Relations Act Section 2(3), as amended, 29 U.S.C. Section 152(3)(1970); N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 378, 66 LRRM 2737 (1967); N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333, 345, 2 LRRM 610 (1938). When the labor dispute is economic in nature, however, the employer is entitled to hire permanent replacements for strikers for the legitimate business purpose of continuing operations. Mackay, supra, 304 U.S. at 345-46; see Plastilite Corp., 153 NLRB 180, 59 LRRM 1401 (1965), modified on other grounds and enforced, 375 F.2d 343, 64 LRRM 2741 (8th Cir. 1967). Economic strikers who have been permanently replaced are entitled to reinstatement only as

vacancies occur thereafter in the employer's work force; the employer is not obliged to discharge the permanent replacements in order to make room for them. Mackay, supra, 304 U.S. at 345-46; General Teamsters Local 162 v. N.L.R.B. 568 F.2d 665, 97 LRRM 2917 (9th Cir. 1978); H. & F. Binch Co. v. N.L.R.B., 456 F.2d 357, 363, 79 LRRM 2692 (2d Cir. 1972); Snow v. N.L.R.B., 308 F.2d 687, 694, 51 LRRM 2199 (9th Cir. 1962); The Laidlaw Corp., 171 NLRB 1366, 1369-70, 68 LRRM 1252 (1968), enforced, 414 F.2d 99, 71 LRRM 3054 (7th Cir. 1969), cert. denied, 397 U.S. 920, 73 LRRM 2537 (1970). If the strikers have not been permanently replaced, however, the burden of proof to that effect resting with the employer, N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, 34-35, 65 LRRM 2465 (1967),

they are entitled to immediate reinstatement upon their unconditional application to return to work. N.L.R.B. v. International Van Lines, 409 U.S. 48, 50, 81 LRRM 2595 (1972); Mackay, supra, 304 U.S. at 345-46. Without such proof, a refusal to reinstate employees after a strike constitutes an unfair labor practice despite the absence of good faith or antiunion animus, since such a refusal "discourage[s] employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act (... 29 U.S.C. Sections 157 and 163)." Fleetwood, supra, 389 U.S. at 378.

None of the asserted permanent replacement employees appeared and testified that were hired as such prior to November 5. In fact Respondent's admission that a decision as to which employees were considered said

permanent replacements would preclude a finding that definite replacements were made prior to November 5. Further, most of the employees ostensibly permanently replaced, according to the exhibits prepared by Respondent, General Counsels Exhibits 39 and 40, were said to replaced prior to being sent the October 30 letter.[164] The four employees hired on November 2 similarly were not clearly shown to have hired as replacements for specific striking employees. The wages paid the alleged replacement employees hired on November 2 were generally lower than hourly rates paid the striking employees. For example, Gabriel Perez was hired starting wage of $4.50 per hour and is said to have permanently replaced Martiniano Rodriguez

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[164] For example, the asserted replacements for Andrade, Alejandro Arroyo, Javier Arroyo, David Coronado, Ricky Craft and Lorenzo Franco were hired on October 22, October 17, October 16 and October 22, respectively.

who, at the time the strike commenced was earning $6.75 per hour. Similarly, Francisco Zamora was earning $6.75 per hour prior to the strike and his alleged replacement started at $4 per hour. The disparity in wages was never explained. Therefore, Respondent failed to sunstain its burden of substantiating with probative evidence its allegations that the employees named permanent replacements were actually hired as such prior to November 5. See N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

Also substantiating this finding is Respondent's admission that Valdez replaced by Art Barrejo the day the strike commenced. Then on November 28, 1979 a new position was created for John Moya who performed Valdez's work among other tasks. Barrejo and Moya were still employed as of June 6, 1980. The reason having two individuals doing Valdez's work is not advanced, and the admission that

a new position was created for Moya contradicts the assertion that he functioned as a replacement for Valdez. Accordingly, it is concluded that Respondent failed to substantiate its burden of establishing that these 10 strikers were permanently replaced prior to November 5, 1979. Where the motive contradictory and unconvincing of [sic] the inference is that the real motive was unlawful. The Bendix Corporation; Research Laboratories Division, 131 NLRB 599, enf. N.L.R.B. v. The Bendix Corp., 299 F.2d 308 (C.A. 6, 1962), cert. den. 371 U.S. 827. Therefore, they have reinstatement rights as unfair labor practice strikers.

However, even assuming arguendo that these 10 strikers were economic strikers, it is concluded that the delayed reinstatement discussed infra, in fact complete failure to reinstate these employees was discriminatorily motivated violation of

Section 8(a)(3) and (1) of the Act. As previously found, Respondent's actions were motivated by antiunion considerations.

Respondent avers that economic exigencies occasioned in part by general economic downturn as well as loss of business due to the strike was one the reasons it did not reinstate these employees; there were few if any job openings for the strikers in this category.[165] As the Court held in N.L.R.B. v. Great Dane Trailers, Inc., supra, at 34: "Once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." Respondent failed

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[165] The economic argument also was made as a defense to the allegations of delayed reinstatement or failure to reinstate striking employees.

to place into evidence any evidence or other financial data. In fact, as is unfortunately true of most of its claims, this defense is proffered only as a bare assertion. The failure to produce documentation, solely within his control, supporting these claims, requires the drawing of an adverse inference. As the Court held in International Union (UAW) v. N.L.R.B., 459 F.2d 1329 (1972) at 1336:

Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. As Professor Wigmore has said:

> "* * * The Failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be

elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted." [2 J. Wigmore, Evidence 285 (3ded. 1940).]

As stated in Northern Packing Co. v. Page, 274 U.S. 65, 74, 47 S.Ct. 491, 71 L.Ed. 929 (1927):

[T]he omission by a party to produce relevant and important evidence of which

> he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause. [Footnotes omitted.]

The failure to subpoena the evidence in no way diminishes the impact of the adverse inference rule. See International Union (UAW) v. N.L.R.B., supra at 1338.

There are other reasons for finding that this defense lacks merit. Respondent admitted that it determined these employees' status as permanently replaced strikers only after they offered unconditionally to return to work. Furthermore, Respondent, through its actions, indicated that it did not intend to reinstate these employees in a manner consonant with the requirements of The Laidlaw Corporation, supra. The Company, subsequent to the unconditional offer return to work, continued hiring new employees. As

previously found, the basis for these new hires is pretext and in derogation of the rights of both nomic and unfair labor practice strikers. See further Kevah Konner, Inc., 256 NLRB No. 8.

Also buttressing this finding as demonstrating Respondent's intent to discriminate against these employees is its requirement that they sign a form stating they wished to be placed on the preferential hiring list. Such a condition to reinstatement rights when the Union offer was admittedly considered sufficient, is discriminatory. The requirement that the document be executed is impermissible precondition for reinstatement, and use of the documents is a further violation of Section 8(a)(1) of the Act. See A & D Davenport Transportation, Inc., et al., 256 NLRB No. 79 (1981) and cases cited therein.

Another example of impermissible preconditions for reemployment involved the threat of loss of seniority. As previously found, when Francisco Zamora asked Ed Simovich if signing the form on May 30 would result in a loss of seniority of 11 years, Simovich told him that he could not respond at that time. Respondent, by implying to Zamora that he could lose his seniority rights, had the effect of coercing Zamora for participating in protected concerted activities. See N.L.R.B. v. United States Cold Storage Corp., 203 F.2d 924 (5th Cir. 1953), cert. den. 346 U.S. 818; The Laidlaw Corporation, supra; N.L.R.B. v. Fleetwood Trailer Co., Inc., supra; N.L.R.B. v. Great Dane Trailers, Inc., supra. By so doing, Respondent violated Section 8(a)(3) and (1) of the Act. Similarly, the uncontroverted evidence of record clearly shows that Jesus Valdez, as a condition precedent to

reinstatement, was required to accept new employee status.

As stated in Transport Company of Texas, 177 NLRB 180 at 285 (1969):[166]

> In The Laidlaw Corporation,[167] the Board made it clear that strikers are entitled to "full reinstatement to fill positions left by the departure of permanent replacements," including the restoration of all seniority rights that they had at the time of the strike. Stated in another way, reinstated economic strikers who were once replaced, but recalled when vacancies occur or other business conditions warrant it, are not to be treated as newly hired

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[166] See also Giddings & Lewis, Inc., 255 NLRB No. 93 (1981).

[167] The Laidlaw Corporation, supra.

employees but must be treated "uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship."[168]

Not only did Respondent require Valdez to be reinstated as a new employee but it required him to submit to a physical examination, a requirement assertedly to be met by all new employees but found above to have been abandoned when replacements were hired during the strike. No legitimate and substantial or compelling business justification was advanced by Respondent in explanation of its actions. The Company clearly placed the strikers in a subordinate class which is explained on the record solely because they exercised their

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168 Great Dane Trailers, Inc., supra.

statutory right to strike, demonstrates coercion. Therefore, as found in Giddings & Lewis, Inc., supra, the Respondent's conduct is inherently destructive of employee rights.[169] That Respondent subordinated the interests of strikers to other employees was clearly established by the pattern of disparate treatment of returning employees compared to those employees who worked during the strike, including replacement employees.[170]

As found in Transport Company of Texas, supra at 181:

> Although Respondent has no seniority plan as such, length of

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[169] See The Laidlaw Corporation, supra.

[170] For example, the failure to investigate the allegations against strikers by asking the strikers what occurred while tolerating violence by nonstrikers. Another example of disparate treatment was the retention, without discipline, of Freddie Vallejos, who was charged with crimes.

service is a consideration which is normally considered by employers in making determinations about employee tenure.

The placing of striking employees in such a subordinate class is violative of section 8(a)(3) and (1) of the Act.

Further indicative of unlawful motive are Respondent's actions in paying without request the accrued vacation earnings of these 10 employees. Also, those "replaced" employees who qualified were sent their profit-sharing contributions. That these actions were demonstrative of Respondent's discriminatory intent is substantiated by E. Simovich in an affidavit given on September 3, 1980,[171] wherein he stated that "Valdez was given back pay. Therefore, the Employer was rehiring Valdez

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[171] General Counsel's Exhibit No. 41.

on August 6, 1980, and that date considered a new date of hire for Valdez." Buttressing this finding is Hoy's reply to Fenton's letter of inquiry regarding the Company's return of employees' vested interest in the Company's profit-sharing plan wherein Respondent admitted they considered the named employees' employment terminated.

Martiniano Rodriguez is found to have not manifested an unequivocal resolve to not accept reinstatement. The Board, in first looking to the sufficiency of a so-called "voluntary quit," began to develop its law in voter eligibility issues. In those cases, the Board held there was a presumption a striker remained an employee and to rebut the presumption, ". . . the party challenging his vote must affirmatively show by objective evidence that he has abandoned his interest in his struck job." Pacific Tile and Porcelain Company, NLRB

1358, 1359 (1962). See also Roylyn, Inc., 178 NLRB 197 (1969) where the Board held that signing a "quit slip" solely to obtain vacation pay was sufficient to show job abandonment.

Subsequently, the Board began to apply this rule of law to issues of reinstatement and backpay rights after a so-called "voluntary quit." See, e .g., Mississippi Steel Corp., 169 NLRB 647, 663 (1968) and The Coca-Cola Bottling Co., NLRB 794, 811 (1977). In a recent case, Harowe Servo Controls, Inc., 250 NLRB 958, 964 (1980), the Board held:

> With respect to the resignations of various unfair labor practice strikers in order to accept other jobs during a strike, the Board in S & M Manufacturing Company,[14] stated that such action "does not automatically eliminate [the striker] as a striking employee, absent

unequivocal evidence of intent to permanently sever [the striker's] employment relationship...[15] In S & M Manufacturing, the Board concluded that the resignations were required by the strikers' new employers before the strikers would be hired and, in such circumstances, the Board found that the "mere submission of their 'resignations' did not constitute an unequivocal abandonment of their status as strikers or of their right to further employment with the Respondent."[16]

And, with respect to determining an economic strikers' eligibility to vote in an election, the Board has set out certain standards pertinent here. [Emphasis added.] The Board has found a presumption of the strikers' eligibility, and has stated:

> [t]o rebut the presumption, the party challenging his vote must affirmatively show by objective evidence that he has abandoned his interest in his job. The nature of the evidence which may rebut the presumption will be determined on a case-by-case basis. However, acceptance of other employment, even without informing the new employer that only temporary employment in sought, will not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote.[17]

Finally, in Standard Materials, Inc.,[18] the Board ordered reinstatement and backpay, [Emphasis added] over the claim that the discriminatees no longer wished reinstatement, where the discriminatees

had not indicated "an unequivocal resolve not to accept reinstatement."[19]

14/ 165 NLRB 663 (1967).

15/ 165 NLRB 663; see also Mastro Plastics Corporation, 136 NLRB 1342, 1329-50 (1962); Cornwell Company, Inc., 171 NLRB 342, 348 (1968).

16/ 165 NLRB at 664.

17/ Pacific Tile and Porcelain Company, 137 NLRB 1358, 1359-60 (1962).

18/ 237 NLRB 1136 (1978).

19/ 237 NLRB at 1136; see also W. C. McQuaide, Inc., 239 NLRB 671 (1978).

The rule to be applied in the instant case is, therefore: Did Rodriguez evince an intent to permanently sever his employment relationship with Champ Corporation and was this proved by Champ with unequivocal evidence.

The facts of Mississippi Steel Corp., supra, are very close to the facts in the instant case. There the employees submitted written resignations during the strike in order to receive their pension plan money. They knew when they submitted their letters of resignation when the letter meant and the effect of same on their jobs. The Trial Examiner opined that the strikers intended the letters to be for "the purpose of obtaining their profit-sharing money, and not needlessly to abandon their job rights." Id. at 663. He then used a balancing of the equities between the company and the employees and decided that the employer has a right to rely on the resignations. Backpay was tolled from the of the "resignations" but their reinstatement rights were not forfeited.

The Administrative Law Judge, in The Coca-Cola Bottling Co., supra, case, at

811, applied the balancing test of Mississippi Steel and found that where the employee did not intend to quit and the employer did not act in good faith, the employer was liable for backpay.

In the instant case, Rodriguez testified that he went to receive benefits that he thought other strikers were receiving. He testified that he was told that, even though he was signing a letter of resignation, not to worry because he was going to get his job back no matter what occurred. Phyllis Lund also testified that Rodriguez had not said anything about quitting prior to his request for money. As in Mississippi Steel, and even more strongly in this case, evidence clearly demonstrates that Rodriguez had no intent to permanently sever his employment relationship.

The fact that Rodriguez "resigned" after the termination of the strike under the

circumstances here present does not toll backpay liability. As noted above the Board in Standard Materials, Inc., 237 NLRB 1136 (1978), ordered reinstatement and backpay for employees who had not shown an unequivocal resolve to accept reinstatement. Here, Rodriguez had not yet been offered reinstatement. As shown elsewhere, the Company's reliance on pending criminal charges was illegal. The Company, then illegally refused to reinstate Rodriguez prior to his attempt to get more money.

Rodriguez's intent not to resign but to merely get additional funds after 10 months of unemployment, his understanding that he was not cutting off employment relationship with Champ based on his understanding of what Phyllis Lund told him, and the fact that other employees also received money from the pension plan balanced against the Employer's repeated unfair labor practice violations

during the reinstatement period, its failure to properly offer reinstatement prior to Rodriguez's request for the money, the Employer's awareness that others had received their profit-sharing money and were reinstated which would tend to confuse an employee as to what he was doing when signing the quit slip, and the Employer's knowledge of Rodriguez's lack of comprehension of the English language, the failure to use an interpreter, are factors requiring a finding that Rodriguez did not clearly evince an intent to permanently sever his employment relationship with Respondent. Therefore, he is entitled to backpay. See also Top Manufacturing Company, Inc., 254 NLRB No. 124 (1981). Accordingly, it is found that M. Rodriguez retains his right to an offer reinstatement and Respondent's failure to make such an offer is violative of in 8(a)(3) and (1) of the Act.

Even if it was found that the Company correctly treated these employees as economic strikers, Respondent's serious and repeated unfair labor practices regarding the group of employees would require an order of full reinstatement with backpay as the most appropriate remedy for the misconduct described herein. See Drug Package Company, Inc., 241 NLRB 330.

In sum, it is concluded that the 10 allegedly permanently replaced strikers, were not shown, by clear and convincing evidence or even reasonable inference, to have been permanently replaced prior to November 5, 1979. Accordingly, they are found to be unfair labor practice strikers. As unfair labor practice strikers, they have the right to reinstatement, even if replacement employees must be terminated. No replacement employees were terminated to make room for unfair labor practice strikers,

whether placed in category or otherwise. With the exception of Jesus Valdez, who was admittedly improperly included in this category, none of the individuals assertedly permanently replaced was offered reinstatement. Even though, after their uncontroverted offer to return to work was made, Respondent continued employing new hires. Respondent's bare assertion that these new hires had greater skills, and hence Respondent was justified in its actions, is not credited, for the reasons stated hereinabove. Furthermore, this defense does not obtain where unfair labor practice strikers' rights were involved.

However, even assuming arguendo that these employees were economic strikers, it strains credibility that not one of these 10 employees had the requisite skills after April 21, 1980 to warrant offering them reinstatement in lieu of a new hire.

Respondent's alteration of job descriptions and/or skill is as requisites to employment were not shown to be justified. In fact, the record supports a finding that the Company terminated these 10 employees. For example, Respondent sent a letter to the 6 employees who had not sent in a written request to be put on the preferential hiring list which included their vested interests in the profit-sharing plan, indicating that it terminated the 10 employees who had been "permanently replaced." Four factors show that Respondent terminated all 10 employees. First, all were sent the second letter demanding a written request within "the next several days." Second, the 6 who were sent their profit-sharing interests were the only ones of the 10 who had vested interests. Third, all were sent the accrued vacation pay without the employees requesting these benefits and without any explanation by

Respondent for this action. Finally, Respondent, in a letter to the Union from Hoy, referred to the employees as terminated. As noted supra, it is sufficient if the words or actions of Respondent would logically lead a prudent person to believe his tenure been terminated to constitute a discharge. Respondent's argument that it did follow its pro forma rules is insufficient in light of Respondent's words and actions. Respondent's eventual recision of these terminations on September 5, in no way mitigates the fact that it did terminate all the so-called economic strikers. By doing so, Respondent violated Section 8(a)(3) and (1) of Act. Tom Simovich, as detailed above, gave varied reasons for the failure to reinstate F. Zamora and Mickey Lambright. Also relevant in determining motivation is the Employer's use of a multiplicity of alleged reasons and the belated explanation for its action, are

familiar signposts to discriminatory intent. See La-Z-Boy Tennessee, 233 NLRB 1255; N.L.R.B. v. Superior Sales, Inc., F.2d 299 (C.A. 8, 1966). Consequently, this defense is found to be another pretext.

The Respondent failed to sustain its burden of proving that its refusal to reinstate these employees was for substantive and legitimate business reasons. In fact, the record clearly supports a finding that Respondent's failure to reinstate these employees was discriminatorily motivated. Respondent's capricious reservation of the right to change job classifications and/or to fill jobs with employees possessing different skills, including the new hires is found to be inherently destructive of employees' rights as provided in Section 7 of the Act, and is found to be violative of Section 8(a)(3) and (1) of the Act. Therefore, even if these employees were found to be economic

strikers, they were discriminatorily denied reinstatement in violation of Section 8(a)(3) and (1) of the Act.

Employees Who Did Not Appear

at the Company on April 21, 1980

It is uncontroverted that the Union's telegram and letter of April 17[172] was an uncontroverted application on behalf of "the employees of Corporation currently on strike...to return to their former positions of substantially equivalent positions, if their former positions no longer exist." The application continued: "The striking employees will be reporting at the start of the scheduled shift on Monday, April 21, 1980." These missives, signed by Gazzigli,

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[172] The Union was fully authorized to make its offer. See, e.g., Comfort, Inc., 152 NLRB 1074, 1079, fn. 6 (1965), enfd. 365 F.2d 867, 877 (8th Cir. 1966) and Colonial Haven Nursing Home, Inc., 218 NLRB 1007 (1975).

further stated that if Respondent had any questions, they should contact him.

Respondent properly argues that those individuals who did not appear on April 21 were governed by the findings in Mississippi Steel Corp., 169 NLRB 562-63 (1968), wherein the Administrative Law Judge's following conclusions affirmed by the Board:

> The Union's letter of August 6, supra, clearly notified Respondent that the strike was terminated and that the bulk of the strikers immediately available would return to work unconditionally on August 8, as they were instructed. So far as it went, such blanket unconditional application for reinstatement on behalf of the strikers was fully authorized and legally sufficient.[82] However, there is no basis for finding, as contended without

explication by the General Counsel, that the Union's letter was a proper blanket application for all strikers without further need for their individual appearance or application for work,[83] particularly as the Union explicitly advised Respondent that the strikers would personally report to the plant. Accordingly, it is found that the strikers who reported or applied for their former or substantially equivalent jobs during the period of the strike, or on and after August 8, and who were refused such reinstatement within 5 days of their application, were discriminated against in violation of Section 8(a)(3).

82/ Lasko Metal Products, Inc., 148 NLRB 976, 994, enfd. 363 F.2d 529 (C.A. 6).

83/ Cf., Brown and Root, Inc., 99 NLRB 1031, 1038, et seq., enfd. as modified 203 F.2d 139 (C.A. 8); Elmira Machine & Specialty Works, Inc., 148 NLRB 1695. 1696.

It is noted that the Brown and Root, Inc. decision, cited in the Mississippi Steel case, based its conclusion that the offer of reinstatement did not include all strikers because the unmistakable language of the offer specifically excluded some employees, "and demands employment in the alternative for those of them who present themselves." One employer's letter of acceptance of the same date revealing its own interpretation of the context of the offer, plainly shows its agreement only to take back such strikers "upon their application for employment." The facts of the case lead the Board to conclude the parties agreed "that the strikers were to make individual applications for

reinstatement." Ibid. at 1040. The other case cited in Mississippi Steel, Elmira Machine & Specialty Works, Inc., 148 NLRB 1695, 1696 (1964), concluded that the Union requested unconditional reinstatement for specific named individuals. The decision in the Mississippi Steel Corp. case, unfortunately, does not contain a clear and full recitation of the union's letter.

The failure in this case of some employees to appear on April 21 did raise a valid question by Respondent as to the status of those employees based on the Union's representation that the striking employees, without noted exceptions, would appear on April 21.

As previously indicated, on April 21 Respondent sent a Mailgram to Gazzigli requesting the names of the individuals included in the Union's classification of

April 17 of employees "currently on strike." The Union replied April 25, 1980, as follows:

> THE STRIKING EMPLOYEES PERSONALLY APPEARED AT THE NORMAL SCHEDULED SHIFT ON APRIL 21, 1980 AND, AT THAT TIME, WERE INFORMED TO REPORT TO THE PERSONNEL DEPARTMENT AT 8AM BY MR. ED SIMOVICH. EACH EMPLOYEE PERSONALLY SIGNED A COMPANY ROSTER AT SUCH TIME AND PLACE AS DESIGNATED BY MR. SIMOVICH. IN ADDITION, STEVEN BAUGH AND THOMAS VARGAS APPEARED AT 9AM AND WERE INFORMED THAT THEY WERE TOO LATE TO SIGN THE ROSTER.

In response to further inquiry by Respondent, the Union, by letter dated May 2, stated that 54 strikers attempted to return to work on April 21 and appended a list of 64 individuals that it asserted were included in

its application for reinstatement. On May 5, Respondent again wrote the Union.[173]

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[173] The letter stated:

> Thank you very much for your response to our mailgram of April 30, 1980. As I am sure you can imagine the administration, mechanics and implementation of the reinstatement of over fifty people is a most complex and arduous one. The list of names that you have supplied will assist us greatly. We do not want to overlook one person's rights to return to work unconditionally. We are pleased that you have finally cooperated in furnishing us the names of the persons who you referred to in your communications as "current strikers" offering to return to work unconditionally. We will now be able to finalize the reinstatement process forthwith utilizing the list of names that you have furnished as a check against those persons who have signed the Company's roster.
>
> Perhaps you may clear up some confusion we seem to have as a result of your communications. You state that the Union's position is that fifty-four (54) offered to return to work unconditionally; with which we agree. However, you have furnished sixty-four (64)

(continued...)

On May 9, a copy of a Mailgram was sent by the Union to Respondent which stated:

> THIS TELEGRAM IS IN RESPONSE TO YOUR LETTER DATED MAY 5, 1980 AND RECEIVED BY THE UNION MAY 5, 1980. THE UNION'S POSITION IS, AND I REPEAT, ALL 64 EMPLOYEES NAMED ON THE LIST SUPPLIED TO YOU BY THE UNION, OFFERED AND CONTINUE TO OFFER TO RETURN TO WORK UNCONDITIONALLY. THE LETTERS O/F/T DESIGNATE

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[173](...continued)

> names to us today stating in your letter, "Please find enclosed a list of names and addresses of the employees that have offered, and continue to offer to return to work unconditionally." Of the sixty-four (64) names furnished us you have the letters O/F/T along side six names and an additional four names alluding to their being on medical disability.
>
> We certainly need your help and assistance in tying this matter down and shall appreciate your assistance. Meanwhile we will continue with the reinstatement process of the fifty-four persons.

THAT EMPLOYEE WAS OUT OF TOWN AND WAS NOT AVAILABLE ON APRIL 21 TO SIGN THE COMPANY ROSTER. IF WAS ON "MEDICAL DISABILITY APPEAR" AFTER THE EMPLOYEES NAME, THAT EMPLOYEE IS UNDER A DOCTOR'S CARE, AND WERE UNABLE TO REPORT I SUGGEST YOU CONTACT THOSE EMPLOYEES AND OFFER REINSTATEMENT AT SUCH TIME AS THE DOCTOR RELEASES THEM FOR WORK. [sic]

Based on these facts, it is found that Respondent was confused regarding the individuals included in the offer. However, such confusion cannot claimed beyond May 9. It is also concluded that Respondent's denial that Baugh and Vargas were properly included in the Union's offer of April 21 is specious. The Company refused to permit them to sign the roster because they were one hour late, which explains their initial exclusion from the category deemed to have properly appeared. However, Respondent did not

include Baugh and Vargas in this category of employees not appearing on April 21. On May 9 Respondent knew the offer encompassed all the employees named in this category. That Respondent accepted the representations of the Union regarding this class of employees is clearly demonstrated by Respondent's offer to various members of classification, such as Avalos, of reinstatement without any further notification of the Union's offer. See W. C. McQuaide, Inc. , 220 NLRB 533, 609, 552 F.2d 519 (3d Cir. 1977). Accordingly, it is concluded that a clear, unconditional offer to return to work was made on behalf of those 8 employees in this category on May 9, and that Respondent demonstrated, through its failure to make further inquiries of the Union regarding these individuals as well as through its subsequent actions, that it

accepted the offer.[174] Cf. Comfort, Inc., 152 NLRB 1074, 1079, fn. 6 (1965), enfd. 365 F.2d 867, 877 (8th Cir. 1966).

Further, if Respondent had any further questions, it was obligated to seek clarification. As the Board stated in Home Insulation Service, 255 NLRB No. 50 (1981):

> Where any such ambiguity remains unclarified due to Respondent's decision to ignore the offer and not seek clarification, Respondent may not be heard to complain if such uncertainty is resolved against its interest. Haddon House Food Products, Inc. and Flavor Delight, Inc., 242 NLRB No. 180, fn. 6 (1979).

Once the Union clarified its collective unconditional application for reinstatement of the 64 named striking

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[174] As previously found, General Counsel failed to show D. Kerr and R. Montoya were striking employees and therefore they are not entitled to reinstatement.

employees, the Employer is not permitted, as discussed hereinabove, to delay reinstatement by insisting that a striker individually affirm the request for reinstatement; the Union's collective application is sufficient. See, e.g., Newspaper Production Company N.L.R.B., 503 F.2d at 829; National-Business Forms, 189 NLRB 964 (1971), enfd. 547 F.2d 737 (6th Cir. 1973). Mississippi Steel Corporation, supra, cited by Respondent, in distinguishable on its particular facts for in this case there was clarification as to who was encompassed in the offer, even though several persons did not appear on April 21, and Respondent clearly, through its actions, accepted the offer as clarified.

The retention of these employees in a separate category or classification by the Company was not shown to be justified. The Employer was obligated, as found above, to timely respond to the Union's application by

making bona fide offers to reinstate the strikers. Newspaper Production Company v. N.L.R.B., 563 F.2d at 829; Rogers Manufacturing Company v. N.L.R.B., 486 F.2d 644, 647 (6th Cir. 1973); The Coca-Cola Bottling Works, Inc., 186 NLRB 1050, 1051 (970), Marlene Industries Corp., 255 NLRB No. 192 (1981). The offer must be "specific, unequivocal and unconditional." See Standard Aggregate Corp., 215 NLRB 154 (1974) and cases cited therein. It is the antithesis of this requirement for the Employer to require separate treatment of these 8 employees in confirmation of the Union's request for their reinstatement. The placing of them in a special category and maintaining that category after May 9, 1980 is a violation of Section 8(a)(3) and (1) of the Act.

Respondent has not claimed that any of these employees engaged in such egregious acts as to justify its failure to timely

reinstate them or otherwise remove them from the protections of the Act. Further, as found above, the Company's economic defense was unsupported and failed to justify untimely reinstatement offers. Further, Respondent argues that it was justified in delaying reinstatement of all its unfair labor practice strikers due to its fear of violence which could result from immediate massive reinstatement. With the exceptions stated above, the Employer has the obligation to reinstate unfair labor practice strikers immediately after their unconditional offer to return to work. After the strike was converted to an unfair labor practice strike, the concerted protected activity is "treated for remedial purposes as an unfair labor practice strike." Marlene Industries Corporation, et al., 255 NLRB No. 192, ALJ Opinion p. 23, n. 59 (1981), and cases cited

therein.[175] Therefore, as noted above, such striking employees are entitled to reinstatement upon their conditional application to return to their former positions, even if placement employees must be discharged to permit the return of the striking employees.

Respondent hired approximately 80 replacements after the strike commenced. As of June 6, 1980, only about 3 replacement employees were discharged. After April 21, about 59 were still working. As of June 6 about 2 were on disability. Also as of June 6, about 25 returning strikers were offered reinstatement. Therefore, it appears that Respondent had more jobs filled by placements on June 6 than there were striking employees wanting reinstatement. Not only do these

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[175] The same remedies obtain if the strike has the dual objectives of an economic and unfair labor practice strike.

figures dispel the reason Respondent's picture of a significant economic downturn of such proportions as to require the elimination of many of the strikers' jobs, but affirms the finding hereinabove that the failure to instate in a timely manner was based on pretext motivated by antiunion animus. This finding is buttressed by Respondent's failure to show changes in its operation which it instituted which did in fact or should have resulted in the elimination of strikers' jobs.

Respondent's obligation to reinstate unfair labor practice strikers begins immediately after their unconditional offer to return to work. In order to allow an orderly process, backpay is ordinarily awarded beginning 5 days after the unconditional offer. Drug Package Co., 228 NLRB 108 (1977). However, strikers who offer to return to work as a group are entitled to

backpay from the date of the offer, where the employer's refusal to reinstate is discriminatorily motivated. Hargis Mine Supply, 225 NLRB 660. Further, Respondent's backpay responsibliity continues until it makes a bona fide and unconditional offer of reinstatement. Burnup & Sims, Inc., 256 NLRB No. 142; Marlene Industries Crporation, et al., supra; Consolidated Freightways, 253 NLRB No. 137. Any offer, to be unconditional, must give the employee reasonable time to respond. Marlene Industries Corporation, et al., supra; Murray Products, Inc., 228 NLRB 268 N.L.R.B. v. W.C. McQuaide, Inc., 552 F.2d 519 (3rd Cir. 1977); Highland Plastics, Inc., 256 NLRB No. 28.

> There is no per se rule requiring a minimum period of prior notification in an offer of reinstatement; the appropriate period is to be determined from the totality of the circumstances,

including the employer's acts of discrimination and their effect on the employees, any false or misleading statements to the employees regarding their employment status and the discriminatee's interim employment. Murray Products, supra; Hirsch v. Trim Lean Meat Products, 479 F. Supp. 1359 (D. Del. 1979).

As more fully described infra, the reinstatement plan by Respondent was an insufficient answer to the employees' unconditional offer to return to work, and as such did not constitute a bona fide offer of reinstatement.

Respondent argues that it delayed reinstatement of the strikers because it feared that, due to the emotions aroused during the strike, there was likely to be violence. However, an employer cannot justify its refusal to timely reinstate unfair labor

practice strikers by claiming hostility among the employees and a fear of violence when "the hostility which did exist was the creation of the Respondent, in substantial part." Pacific Powder Co., 84 NLRB 280 (1949). Cf. The Cross Company, 143 NLRB 1005, 1008-1013. In this case, Respondent hired an individual allegedly belonging to the Escondido Flores, various non-striking employees and supervisors[176] engaged in misconduct without reprisals from the Employer. Also, the plant managers threatened to, and then did, unlawfully discharge employees engaged in a lawful strike. T. Simovich and other managers clearly exhibited antiunion animus. This pattern of conduct by

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[176] Larson attacked strikers with vehicles and Vallejos attacked Rodriguez, spit on Naranjo and was arrested for swinging an ax at picketers. Vallejos was placed on probation. R. Rodriguez was hit by a non-striking employee and that employee was not sought by the Company for disciplinary purposes.

Respondent is found to be a substantial factor in developing the level of utility between strikers and nonstrikers. Finally, Respondent introduced no evidence to show that, prior to the actual reinstatement, there was any indication that the presence of the strikers would create a safety hazard save from the actions of nonstriking employees who might have been discharged to make room for the returning strikers if, as the Company claims, there were positions insufficient to permit reinstatement of all strikers. Therefore, Respondent cannot now assert a defense of fear of violence in the plant.

Similarly, Respondent offered no evidence that it was unable to exercise its responsibility to oversee quality control such that it would result in the increase of its insurance. This argument is a sham and is not credited. This bare assertion,

characteristic of other bare assertions, such as the defense economic impairment and other unsubstantiated conclusionary denials, are in large part the defenses presented by the Company, particularly Ed Simovich. While, at times, no more detailed evidence is possible, such bare denials are not generally entitled to much weight. This finding is particularly true where, as here, Ed Simovich's other testimony is not entirely reliable, and Respondent had soley within its grasp the opportunity to demonstrate its claims through communications with its insurer, customers or other entities. See Hargis Mine Supply, Inc., supra at 663. Cf. Chauffeurs, Teamsters and Helpers, Local 633 of Hampshire Law Motor Freight v. N.L.R.B., 509 F.2d 490 (C.A D.C., 1974); Shattuck Denn Mining Corporation v. N.L.R.B., 362 F.2d 466, 470 (C.A. 9, 1966); N.L.R.B. v. Edward P. Tepper, d/b/a Shoenberg Farms, 297 F.2d 280, 284 (C.A. 10, 1961).

Respondent's business justification was similarly without justification in the record, see infra regarding the so-called "laid off" employees, and is also discredited. As these reasons have been discredited, the only reason which is credible is that the Respondent intended to delay the reinstatement of the strikers because they engaged in protected concerted activity. Such conduct is violative of Section 8(a)(3) and (1) of the Act.

The operation of the reinstatement plan demonstrates the total disregard for these employees' rights. For example, Respondent admitted that, before allowing the reinstatement of a worker, it would first decide whether the to which the striker was entitled should be changed and new skills required. This unilateral attempt to change the job classifications, without substantial business justification, is discriminatory,

destructive of employee rights, and is a violation of Section 8(a)(3) and (1) of the Act.

Similarly, Respondent admitted that it would only hire those persons it felt were "most qualified" for the job, including new hires. As the Administrative Law Judge said in Lincoln Hills Nursing Home, Inc., 257 NLRB No. 145 ALJ opinion p. 31:

> I conceive of no more glaring example of discrimination so foreseeably causing employee response in contravention of Section 7 rights as to obviate the need for any other proof of intent than to afford new hires employment opportunities superior to those of strikers awaiting recall. Such disparate treatment is unlawful. It patently discourages, union activity, The Radio Officers Union v. N.L.R.B., 347 U.S. 17

(1954); N.L.R.B. v. Erie Resistor, 373 U.S. 221.

Respondent did, in fact, hire at least two new employees when strikers had not been reinstated. By doing so, Respondent violated Section 8(a)(1) and (3) of the Act.

By drawing up the reinstatement plan in such a way as to delay strikers' reinstatements for discriminatory reasons, Respondent violated Section 8(a)(1) and (3) of the Act. Because Respondent's plan and its failure to reinstate the striking employees was discriminatorily motivated, its backpay liability begins on April 17, 1980, the date of the employees' offer to return as as a group. Hargis Mine Supply, supra.

Marvin Cummings was alleged by Respondent to have been permanently replaced and then laid off. Cummings did not notify the Company of his unavailability prior to April 21 because of jury duty. Respondent

offers no evidence as to whom he was replaced by nor has Respondent showed substantial business reasons for its failure to reinstate him. In fact, his uncontroverted testimony is that an unemployment office in March 1980 told him that Respondent had an opening in his job classification, which further substantiates the finding that the failure to reinstate these employees was discriminatorily motivated. Cummings, therefore, must be classified as an unfair labor practice strikers and Respondent's failure to reinstate him is a violation of Section 8(a)(3) and (1) the Act. Since Cummings, at the end of the strike, was fully capable of returning to work, Respondent has not tolled its backpay obligation.

Manuel Avalos was given a bona fide offer of reinstatement on July 10, 1980. There is no contention that, in these circumstances, the 4-day time period was an

insufficient time to allow Avalos to consider the offer. Therefore, Respondent has tolled its backpay obligation with respect to Avalos on July 11, the day Avalos quit. Since Avalos voluntarily quit, Respondent has no further obligation of reinstatement.

Vincente Banaga, by Respondent's telegram of July 16, was offered reinstatement. Respondent's offer was not an unconditional one as it allowed only 2 days for Banaga to begin work. However, since Banaga did in fact begin work on July 18, that date should be found to be when Respondent made its conditional offer of reinstatement.

Raul Cortez and Calvin Hassler were offered unconditional reinstatement July 10, 1980, thus tolling Respondent's obligation for backpay. Since both employees never responded again, they are deemed to have voluntarily quit and no reinstatement is

warranted. The same finding obtains to David Hassler. Oscar Guerrero was offered reinstatement on July 10. There is no contention that this offer was not bona fide. Therefore, Respondent's obligation for backpay ended July 10 for Guerrero.

Ronald Kerr, as an unfair labor practice striker, was entitled to reinstatement. Respondent made an offer of reinstatement on July 10, but the offer was subsequently retracted and Kerr was placed on layoff status. Kerr was replaced with new hires which Respondent alleged had greater skills and has not yet been offered reinstatement. As noted supra, the preference of new hires over strikers is inherently destructive of employees' rights. Further, Respondent's attempt to redefine the job so as to make the striking employee ineligible for the job is also inherently destructive of

the striker's rights, and in violation of Section 8(a)(3) and (1) of the Act.

Recall of Employees on Layoff

Respondent argues that it properly limited the reinstatement rights of Gonzalo Andrade, Manuel Garay, Javier Lopez and Jose Noyes by limiting the duration of their reinstatement rights on or about May 30, 1980 when they were offered reinstatement and placed on layoff status. Respondent cites no cases to support its position. Counsel for General Counsel argues that since Respondent did not proffer any business justification for limiting the strikers' recall rights, it violated Section 8(a)(1) and (3) of the Act, citing Vitronic Division of Penn. Corporation, 239 NLRB 45 (1978). In the Vitronic case, which involved economic strikers, it was found that by unilaterally prescribing limits on strikers' recall rights, Respondent violated the Act.

The record fails to show, as Respondent notes in its brief, what the Respondent's layoff and reinstatement policy was before the strike. As the Supreme Court points out in Fleetwood Trucks, supra, 389 U.S. at 378, the burden of proving justification is upon the employer.

The record does show, as exemplified by the testimony of Castonguay, that certain alleged replacements were relatively unskilled and had to be trained, many months after the offer to return to work of April 21, to meet the Company's needs. Also some laid-off replacement employees were reinstated before the unreinstated strikers were recalled. Thus, it is shown that replacement employees were not subject to the same limits on their recall rights. This recall policy is found to be a grant of superseniority to replacement employees.

As the Board held in Giddings & Lewis, 255 NLRB No. 33, 106 LRRM 1391 at 1392 (1982):

> Similarly, in Erie Resistor,[3/] the Court concluded that the Board was entitled to view an employer's grant of superseniority to strike replacements and to strikers who abandoned the strike as conduct so destructive of employee rights that it carried its "own indicia of intent" and was "barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights."

3/ N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221 at 231.

As noted above, the Company has failed to substantiate their claims of economic exigencies, changes in product lines, alterations in guidelines or other

factors which would save its actions from "illegality" with respect to economic strikers, no less unfair labor practice strikers.

As previously determined, Respondent's actions were discriminatorily motivated and it is further determined that the limiting of recall rights with lawful justification is inherently destructive of striking employees' rights in violation of Section 8(a) (3) and (1) of the Act. The subsequent removal of this recall right was insufficient mitigation, particularly in light of the fact that none of these employees was recalled.

Reinstatement of Employees Who Had Been Charged With Crimes During the Strike

In N.L.R.B. v. Great Dane Trailers, Inc., supra, the Supreme Court recognized that discharges of or refusals to reinstate strikers were actions inherently destructive

of employee rights encompassed by Section 7 of the Act. This finding however, does not obviate the burden of proof of General Counsel to establish that such actions were discriminatorily motivated. See Laredo Coca-Cola Bottling Company, 258 NLRB No. 69 (1981), which further provides[177] regarding economic strikers:

> Accordingly, the General Counsel must first establish that an individual was, in fact, a striker and that an employer took some action against him for conduct while said individual engaged in the strike. At that point, the burden shifts to the respondent which must prove that it entertained an honest belief that the striking employees have engaged in misconduct. Such constitutes an adequate defense to

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[177] Slip op., ALJ decision, page 13.

a charge of discrimination in refusing to reinstate strikers except where the General Counsel affirmatively establishes that the employees did not, in fact, engage in such misconduct or where the conduct in question was not ". . . so flagrant or egregious as to require subordination of the employees' protected rights in order to vindicate the broader interest of society as a whole." Dallas General Drivers, Warehousemen - and Helpers, Local Union No. 745, International Brotherhood of Teamsters, Chauffuers, Warehousemen & Helpers of America v. N.L.R.B., 389 F.2d 553 (D.C. Cir. 1968); Gold Kist, Inc., 245 NLRB No. 142; Birch Tree Number One, Incorporated, d/b/a Birch View Manor, 243 NLRB No. 87; Co-Con, Inc,, 238 NLRB

No. 41; Rubin Bros., supra.[178] Once the General Counsel has established that the misconduct did not occur, the burden shifts to the respondent to rebut the denials. Gold Kist, Inc., supra.

In such rebuttal, Respondent need not prove it had an honest belief of wrongdoing by conclusive evidence or that there was a certainty of guilt,[179] but also to be considered is the existence of independent evidence of unlawful animus; whether the reports, upon which the Employer acted, were reliable and credible, not without foundation and promptly reported; and whether the witnesses themselves were worthy of belief. Laredo Coca-Cola Bottling Company, supra at 13, citing Birch View

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[178] Rubin Bros. Footwear, Inc., 99 NLRB 610.

[179] Farmers Co-Operative Gin Association, 161 NLRB 887, 911.

Manor, supra; Giddings & Lewis, Inc., 240 NLRB No. 64; Associated Grocers of New England, Inc., 227 NLRB 1200, enf. in part 562 F.2d 333 (1st Cir. 1977).

Where, as found here, the strikers are unfair labor practice strikers, an employer's erroneous belief, however sincere, that a striker has misconducted himself does not constitute a defense to refusing to reinstate him. Rutter-Rex, 58 NLRB 1414 at 1418, 1448-49. Additionally, Rutter-Rex indicates (158 NLRB at 1418) that disqualifying misconduct by an unfair labor practice striker must be shown by a preponderance of the evidence. However, see Farmers Co-Operative Gin Association, 161 NLRB 887 (1966), enfd. and affd. sub nom. Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745 v. N.L.R.B., 389 F.2d 553 D.C. Cir. 1968); Coronet Casuals, 207 NLRB 305; Mosher Steel Company, 226 NLRB 1163,

1164, 1166-67 (1976), modified 568 F.2d 436 (5th Cir. 1978).

It is Respondent's position that police reports, personally observed, activities and reports from employees who worked during the strike, form adequate bases for the Company's good faith belief that the employees in this category engaged in conduct "so flagrant or egregious as to require subordination of those employees' potential rights in order to protect the broader interest of society as a whole." Dallas Drivers, Warehousemen and Helpers, supra. General Counsel argues that the only assertion prior to the hearing regarding recall of those strikers involved consideration of criminal charges, and no other reason for delaying or refusing recall was ever asserted prior to the commencement of the hearing, that the motive was not these employees' individual picket line conduct but

discriminatory motive. Citing W.C. McQuaide, Inc., 220 NLRB 593 (1975); The Colonial Press, Inc., 207 NLRB 673 (1973), enf. den. in part 509 F.2d 850 (C.A. 1975), cert. den. 423 U.S. 833.

Another factor to be considered not mentioned by the parties is Respondent's conduct. As stated in Harowe Servo Controls, Inc., 250 NLRB 958, 1111:

Accordingly, in determining whether to reinstate the . . . dischargees on the alleged ground of alleged strike misconduct, the severity of the employer's unfair labor practices which . . . prolonged the strike must be balanced against whatever misconduct by each dischargee may have occurred in the course of the strike. [Citations omitted][180]

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[180] Furthermore, even assuming that the Employer's refusal to reinstate the dischargees did not of itself constitute an unfair labor practice, the Board must nonetheless determine whether to afford them (continued...)

[180](...continued)
reinstatement with backpay, as a remedy for Respondent's unfair labor practices which caused and prolonged the strike. Local 833, UAW (Kohler Co.) v. N.L.R.B., 300 F.2d 699. 701-705 (D.C. Cir. 1962), cert. den. 370 U.S. 911, decision on remand 148 NLRB 1434, 1453-54 (1964), enfd. 345 F.2d 748 (D.C. Cir. 1965), cert. den. 382 U.S. 836; N.L.R.B. v. Puerto Rico Rayon Mills, Inc., 293 F.2d 941, 947 (1st Cir. 1961); Golay & Co., Inc. v. N.L.R.B., supra, 371 F.2d at 261-263; Farmers Cooperative Gin, supra, 389 F.2d at 555; N.L.R.B. v. Wallick, supra, 198 F.2d at 485; N.L.R.B. v. Wichita Television Corporation, Inc., d/b/a KARD-TV, 277 F.2d 579, 585 (10th Cir. 1960), cert. den. 364 U.S. 871. The Board "has power under Section 1(c) to order reinstatement If the discharges were not 'cause' and if such an order would effectuate the policies of the Act"; and "a determination that an employee is not engaged in a Section 7 activity does not necessarily mean that, if he is discharged for his participation in the unprotected action, the discharge is for cause.' That depends on the surrounding circumstances. What is cause in one situation may not be in another." N.L.R.B. v. Thayer Co., 213 F.2d 748, 753 (1st Cir. 1954), cert. den. 348 U.S. 883; Hennepin Broadcasting Associates, Inc., 225 NLRB 486, 499-500 (1976), enf. 96 LRRM 2585 (8th Cir. 1977), cert. den. 46 L.W. 3200 (1977). A recent Fifth Circuit decision indicates that this balancing test is inapplicable to threats and violence directed, not against management, but against fellow employees who did not themselves
(continued...)

Upon first examination of the record, it would appear that Respondent could have reasonably believed that some of the

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[180](...continued)
engage in provocative misconduct. Mosher Steel Co. v. N.L.R.B., 568 F.2d 436. However, neither the Board nor other courts have thus confined it. See, e.g., Elmira Machine and Specialty Works, Inc., et al., 148 NLRB 1695, 1698-99; Coronet Casuals, supra, 207 NLRB at 308; Thayer, supra, 213 F.2d at 757; Kohler v. N.L.R.B., supra, 300 F.2d at 701-705, Kohler, 300 F.2d at 703, explained the basis for this rule as follows:

> First, the employer's antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action. Second, reinstatement is the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union . . . . But sanctions other than discharge--criminal prosecutions, civil suits, union unfair labor practice proceedings, and the possibility of discharge--are available to prevent or remedy certain employee misconduct.... Hence automatic denial of reinstatement prevents the Board from protecting the rights of employees, but may not be essential to the protection of legitimate interests of employers and the public.

strikers engaged in conduct sufficiently egregious as to remove the protections of the Act or to render them unsuitable for further employment. The record is replete with violence, profane vituperation and threats. However, several factors dispel this first impression. The first factor, as mentioned by General Counsel, is that Respondent, in all written materials, including the letter of May 30, 1980 and various subsequent affidavits, referred solely to strike-related pending criminal charges as the basis for the Company's failure to reinstate those striking employees. Also considered is the fact that 3 of these employees-- Solis, Padilla and M. Rodriguez did not have any pending criminal charges on this date. The credited testimony, as discussed above, supports this finding as does the unusual delay in analyzing all the other allegations against those individuals. As noted above, where the

motive is contradictory and unconvincing, the inference is that the real motive was unlawful. The Bendix Corporation, supra. Also, the use of a multiplicity of alleged reasons and the belated explanation for its actions are familiar signposts of discriminatory intent. La-Z-Boy Tennessee, 233 NLRB 1255.

The second factor is the disparate treatment accorded the striking employees compared to nonstriking employees. As found hereinabove, when nonstriking employees used profanity, made threats,[181] made gross gestures,[182] and assaulted strikers.[183]

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[181] For example, Freddie Vallejos swinging an ax at pickets; another unidentified employee got out of a vehicle and punched a picket; and the threats made by employees to returning strikers.

[182] The sign in the vehicle depicting the commonly accepted gesture which features the middle finger of the hand.

The more rigorous application of rules against individuals engaged in protected concerted activity is demonstrative of unlawful motive. As found herein, Respondent's actions were motivated by antiunion animus, therefore the more rigid application of disciplinary measures to strikers for misconduct is a violation of Section 8(a)(3) and (1) of the Act. See Upland Freight Lines, Inc., 209 NLRB 165 (1974), enf. 527 F.2d 766 (C.A. 9, 1976); and Keller Maufacturing Company, Inc., 237 NLRB 712 (1978).

A third factor to be considered is whether General Counsel has sustained its burden of proving condonation. To facilitate

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[183](...continued)

[183] Rodriguez was assaulted twice by Freddie Vallejos; Joe Sanchez was hired although he was in the vehicle which contained the assailant who knifed Pedro Lopez; and not investigating thoroughly the alleged assaults on Padilla and others after they returned to work.

appreciation of the burdens of proof, the philosophy underlying condonation, as presented in Union Drill Co., 124 NLRB 1143 at 1155-56 (1959), is as follows:

> The Supreme Court has ruled that where a strike is characterized by unprotected activity, or even by illegal employee action, the employees take "the risk of termination of their employment." (N.L.R.B. v. Fansteel Metallurgical Corporation, 306 U.S. 240, 255), and the employer is "at liberty to treat them as having severed their relations with the Company." N.L.R.B. v. Sands Manufacturing Company, 306 U.S. 332, 344. By the same token, the employer is equally at liberty to disregard or waive the wrong, and to retain the offenders in his employ. It has never been suggested that the Act requires an employer to discharge an

employee guilty of wrongful conduct, or that the Act itself terminates the relationship. The wrongful conduct merely permits the employer to take affirmative action to that end. Accordingly the courts and the Board have uniformly ruled that the only right accruing to an employer from unprotected strike conduct is the privilege or liberty to terminate the employment of the strikers because of their misconduct. Stewart Die Casting Corporation v. N.L.R.B., 114 F.2d 849, 856 (C.A. 7), cert. den. 312 U.S. 680; N.L.R.B. v. Aladdin Industries, Inc., 125 F.2d 377, 382 (C.A. 7), cert. den. 316 U.S. 706; Hazel Atlas Glass Company v. N.L.R.B., 127 F.2d 109, 118 (C.A. 4); N.L.R.B. v. Reed & Prince Manufacturing Company, 118 F.2d 874, 886 (C.A. 1), cert. den. 313

U.S. 595; N.L.R.B. v. Alabama Marble Co., 185 F.2d 1022 (C.A. 5).

> Though "condonation may not lightly be presumed from mere silence or equivocal statements, . . . [if it] clearly appears from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred," then condonation has been established. N.L.R.B. v. Marshall Car Wheel and Foundry Co., 218 F.2d 409 (C.A. 5).

The record in this case demonstrates clearly that Respondent forgave established the intent of treating at least some of the guilty employees or threatening them as if some or all of their misconduct had not occurred. The letter of October 30 offered unconditional reinstatement if the striking employees returned by November 2.

The Company made no exceptions to the offer. Company was well informed regarding all arrests and other allegations of conduct, usually within a day or two of the asserted event. Therefore, all alleged misconduct occurring prior to October 30 is found to have been condoned by Respondent.

Further, when these employees unconditionally offered to return to work, they were told verbally and by letter on May 30 that they were considered eligible for reinstatement solely because of the pending criminal charges for strike-related incidents. Subsequently, on June 6, Respondent confirmed that they were suspended to permit the Company to "look deeply into your pending criminal charges which resulted from your arrest(s) for strike-related violence. Should your arrests be determined to be false, we will be in touch with you regarding your reinstatement to work." Also

Ed Simovich admitted that these 13 employees were never informed that the Company would consider any factors other than the incidents leading to their arrests in the reinstatement.

As found in Colonial Press, Inc., 207 NLRB 673 at 674 (1973):

> It is true, however, that we make an exception to this guarantee [of reinstatement] with respect to employees who commit acts, during their employment, or for that matter during the strike itself, which are sufficiently beyond the pale of acceptable employee conduct to warrant the employer's refusal to reemploy them. But we have long engrafted on this exception the qualification that his refusal to reemploy such persons must, demonstrably, be founded upon a genuine concern about the employees' misconduct.

Thus, when the employer, by his statements or conduct, evidences a lack of genuine concern about such misconduct by forgiving it or by offering reemployment despite the prior misconduct, we will not permit him subsequently to reassert the condoned conduct as a basis for refusing reemployment. For, once he has indicated that the misconduct on which he relied for severing the employment relationship is no longer his true reason for denying reemployment to those who have protested his unlawful acts, there can remain only the discriminatory reason for denying such reemployment-i.e., retaliation against such persons for having struck or picketed in protest against the employer's unlawful interference with employee rights.

In this case, Respondent never indicated, prior to the commencement of the

hearing, that misconduct other than that leading to arrest and conviction, was a basis for its refusal to reemploy those 13 strikers. The failure to mention other alleged misconduct until more than a year after the offer to return to work compared with the credited testimony that the basis for not hiring these strikers on May 30 was because they had criminal charges against them, the fact that Solis was told that he might be placed on a waiting list after the charges were dropped and Padilla was offered reinstatement merely by mentioning that the charges against him had been dropped, and no striking employees other than those 13 were ever investigated or considered ineligible for committing egregious acts,[184] it is

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[184] For example, Respondent knew that Baugh followed Gary, yet offered him reinstatement. Further, as previously discussed, Respondent did not take any actions against nonstriking employees who (continued...)

found that Respondent explicitly condoned all alleged activity which did not result in arrest and/or the filing of criminal charges. Accordingly, the contention that picket line misconduct that did not result in criminal charges was considered in reinstating employees in this category is found to be a violation of Section 8(a)(3) and (1) of the Act since these activities were condoned.

Even if condonation were not found, the lack of consistent application of any clear standard regarding the employees' conduct and the inconsistency in Ed Simovich's testimony, including affidavits, warrants the conclusion that use of allegations of misconduct against

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[184](...continued)
engaged in misconduct but were not arrested. In fact, Respondent did not discipline any nonstriking employees for misconduct whether such misconduct led to criminal charges or not.

only this classification of strikers was a pretext to mask discriminatory motives.

The Individual Employees

1. Gutierrez and Ortiz

Counsel for General Counsel stated that Ruben Gutierrez and Eduardo Ortiz "are not entitled to reinstatement . . . because of their picket line activities, they disqualified themselves from reinstatement."[185] Therefore, only the rights to reinstatement of the remaining 11 employees in this category are in issue. The admission by General Counsel that these strikers' conduct is disqualifying is found to be probative of the propriety of Respondent's refusal to reinstate these employees. However, since both Gutierrez and Ortiz were discharged prior to the end of the strike, and Counsel for General Counsel failed adduce any

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[185] Transcript pgs. 1681-82.

evidence specifically detailing the activities deemed disqualifying, the resolution of whether any backpay liability obtained will be deferred to the compliance phase of this proceeding.

2. Jose Villavicencio

Villavicencio was arrested November 9, 1979 for throwing rocks at a passing vehicle, a violation of the California Vehicle Code Section 23110(a). As noted supra, the charge was dropped on December 3, 1980 on a motion by the District Attorney. The charge stems from an incident in which Arturo Nieblas filed a complaint alleging he threw rocks or stones. He was not arrested. Villavicencio testified that he did not in fact throw rocks at anybody. As Arturo Nieblas was not called to testify and since the charge was dropped, there is no basis in the record with which to contradict his denial. Respondent also contends that

Villavicencio was in the car Solis was driving when Castonguay was allegedly "forced off the road." As previously noted, Castonguay did not credibly testify regarding the alleged attacks against him. Further, Respondent did not consider the fact that Sanchez was riding in the same car as the individual who stabbed Pedro Lopez as a disqualifying factor; hence its assertion that a similar association by Villavicencio with Solis is disqualifying, is again indicative of animus due to the extremely disparate approach taken by Respondent in its treatment of striking and non-striking employees.

The Solis incident, Castonguay testified, occurred on March 10, 1980 when Solis and a passenger swerved three times into his path, nearly hitting him, forcing him to stop to avoid hitting a parked car. Foreman Bobby Smith, however, testified that

Solis was attempting a right hand turn and would not have hit Castonguay, even if Castonguay had not stopped. Even if this incident actually happened as Castonguay alleges, the fact that Villavicencio was present, without more does not support an inference that Villavicencio actually participated in the conduct of Solis. Since, during the entire strike, there is no other report that Villavicencio was engaged in any other misconduct of any kind, Respondent has no credible basis to terminate him and to deny him reinstatement. By refusing to reinstate him and by terminating him, Respondent violated Section 8(a)(3) and (1) of the Act.

3. Carlos Almaroz

Almaroz testified that he was arrested only once during the strike for throwing rocks at a vehicle and he was not charged with any violations of the Penal

Code. On November 19, 1979, he was charged with violations of the Vehicle Code. The vehicle was Nick Ianello's and the incident was witnessed by Larson. As previously found, Almaroz's denial is credited. The criminal charges were dismissed November 30, 1979. Therefore, contrary to Respondent's assertions, Almaroz had no charges pending against him at the end of the strike.

Respondent alleges that there were six specific incidents of conduct on the part of Almaroz, any one of which would warrant denial of reinstatement. Each of these alleged incidents has been discussed earlier and, except for the rock throwing which Larry Larson testified to, all the other incidents were not the subjects of criminal charges. Since Larson's testimony has been discredited, there is no credible evidence of culpability. Tom Simovich's testimony regarding another alleged rock-throwing

incident was similarly discredited. The asserted threat of Almaroz to bomb Loren Peaslee's car was also so unlikely to have happened based upon the credibility of the witnesses and the fact that Peaslee was shopping with his wife and children. That Almaroz was assertedly in the car that Solis allegedly used to drive Corona off the road, without corroborating testimony, is also not credible. There is no evidence to show that Almaroz was an active participant, aid or abettor to Solis, if he did in fact engage in such conduct. N.L.R.B. v. Fansteel Metallurgical p., 306 U.S. 240. See also, W. J. Ruscoe Co., v. N.L.R.B., 406 F.2d 725 (6th 1969); Oneita Knitting Mills, Inc., v. N.L.R.B., 375 F.2d 385 (4th Cir. 1967). Finally, Respondent claims that Almaroz struck the car of Rene Gonzales then threatened Alfredo Cisneros. As discussed supra, this allegation was credited because

of the lack of credibility of both Gonzales and Cisneros.

Respondent claims it first put Almaroz on suspension because of the pending charges against him when in fact there were none. Then, Respondent asserts, only after investigation did it decide to terminate Almaroz. However, reasons advanced by the Respondent for denial of reinstatement are sufficient.

When an employer claims that it denied reinstatement to an employee for strike misconduct, it must show, for an economic strike, a good faith belief that the striker was engaged in the conduct for which discharge was justified and, for unfair labor practice strike, that disqualification was justified by ponderance of the evidence. Rubin Bros. Footwear, Inc., 99 NLRB 610 (1952); N.L.R.B. v. Burnup & Sims, Inc., 379 U.S. 21 (1964). In the context of this

strike where charges and countercharges were exchanged almost daily the Employer must show a valid basis for its actions at the time of the termination. Here, Almaroz was discharged on October 31, 1980. There is no evidence whatsoever in the record which shows what factors Respondent actually used and testimony the Company actually relied on in sending the termination notices. The assertions by Respondent of Almaroz's misconduct do not affirmatively show Respondent's belief that the misconduct actually happened and Almaroz was the perpetrator. Therefore, since the non-charged misconduct was condoned, since the alleged incidents were not shown to have occurred, since Respondent has not met its burden of proof and since Respondent engaged in serious misconduct, the termination and denial of reinstatement of Carlos Almaroz are violations of Section 8(a)(1) and (3) of the Act.

4. Joe Solis

Solis was arrested during the strike several times, once for threatening to bomb the vehicle of a strike replacement. This charge was dismissed.[186] It is noted that several of the allegations made by the Company against Solls are serious and if

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[186] Solis also assertedly threatened to kill Tom Simovich if he hired any more replacements. This alleged threat was not the subject of a criminal complaint and Solis was not shown to be considered disqualified from further employment by Respondent for it apparently offered Solis reinstatement in its October 30 letter. There was no evidence that any striking employees were excluded from the offer. Further, it is noted that with the threat to bomb a vehicle, Respondent alleges Solis fled to Colorado. The record shows, without controversion, that Solis went to Colorado to attend the funeral of his brother, then returned to California. There was no evidence of flight. Further, other allegations occurring prior to October 30 are not considered herein, not only for the reasons already stated but because many of these allegations were unsupported by probative, persuasive evidence, and Respondents admitted limiting its considerationa to strike misconduct which led to criminal charges.

Respondent demonstrated by the preponderance of evidence that such conduct was the basis for its actions, its failure to reinstate Solis and his subsequent termination would have been warranted. However, many of the allegations were unsupported by probative evidence. For example, the allegation of making racial slurs against Hung Lam and Ly Hen was not supported by testimony by Lam or Hen. The asserted threat against Corona was similarly not supported by Corona's testimony.[187] Therefore even if Respondent had not limited itself to strike misconduct resulting in criminal charges, it has not shown by the preponderance of the evidence that Solis engaged in such egregious conduct

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[187] As found hereinabove, Castonguay's allegation that Solis tried to run himoff the road was not credited even though corroborated by Smith. Solis did make a right turn but there was no showing of malice or misconduct.

as to require subordination of his Section 7 rights. Therefore, it is concluded that the failure to reinstate Solis and his subsequent discharge violated Section 8(a)(3) and (1) of the Act as alleged.

5. Ramon Rodriguez

Similarly to Almaroz, there is no evidence in the record that Rodriguez had outstanding charges against him at the end of the strike. He was arrested twice during the strike. It is unclear as to whether he was charged both times, once, or not at all. According to Rodriguez, he was arrested for the October 19 fight with Fred Vallejos, but he was not charged with any crime. The second time he was arrested was because Tom Simovich alleged that Rodriguez had kicked the side of a car. Rodriguez testified that not only did he not do it, but that he had sneakers on at the time. This testimony was corroborated by Ortiz and Solis. There is no

evidence that he was charged with any crime in relation to this incident.

Respondent alleges that, in addition to the above acts of misconduct, Rodriguez engaged in several other acts of misconduct. On November 28, 1979 he assertedly beat on John Hong's automobile hood and dented it. Rodriguez testified that not only did he not purposely beat on the hood, but was in fact tempting to get out of the way of the car which had already struck him in the leg. The incident was testified to by Ed Simovich whose testimony has previously oen discredited. As previously detailed, several picketers had been brushed or struck by vehicles moving through the picket line. The operators of those vehicles were never cautioned or disciplined. Based on the credibility resolutions made herein-before, Rodriguez's version is credited. Similarly, Ed Simovich's account that

Rodriguez pounded on the side of Ceferino Moreno's automobile in December 1979 and on the side of the company trucks throughout the strike is also discredited. As previously discussed, Bruce Gary's allegation that Rodriguez threatened him was also not credited. Further, Respondent has not shown that it knew of this event prior to its decision to not reinstate and to terminate Rodriguez.

Assuming arguendo that Rodriguez was guilty of striking vehicles with his hands as they passed through the picket line, this conduct is not disqualifying. As noted in W.C. McQuaide, Inc., 220 NLRB 593, 593-94 (1975):

> A striking employee who engages in serious acts of misconduct may lose the protection of the Act and subject himself to discharge. But, as has long been recognized by Board and court

decisions, undue strictures on the exercise of Sections 7 and 13 rights could be imposed if every act of impropriety committed by a striking employee is deemed sufficient to place that employee outside the protection of the Act. In a situation such as that . . . , the Board has therefore evaluated the character of the improper acts committed by striking employees and has drawn certain distinctions. Thus, the Board has differentiated between those cases in which employees have arguably exceeded the bounds of lawful conduct during a strike in a "moment of animal exuberance" from those cases in which the misconduct is so flagrant or egregious as to require subordination of the employee's protected rights in order to vindicate the broader interests of society as a whole.

That Respondent obtained a temporary restraining order sometime in January 1980 to reduce the number of pickets present at the gates does not render the misconduct or the obstruction of a thoroughfare so egregious as to warrant subordination of the employees' interests; as the Board observed In W.C. McQuaide, ibid.:

> . . . that striker conduct in contempt of an injunction against unnlawful picket line activity "does not relate . . . to the . . . issue of whether the conduct was sufficiently egregious in character to strip an individual of the protection of the Act." Id. at 594. To like effect is N.L.R.B. v. Cambria Clay Products, 215 F.2d 48, 54 (6th Cir. 1954):
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> > It is not the fact that there was a violation of the injunction that determines whether they [the

strikers] should or should not be reinstated, but the type of conduct they engaged in, and the manner and nature and seriousness of their violation of the order.

Additionally, an employer's honest but mistaken belief that a striker engaged in flagrant or egregious misconduct does not legitimatize a discharge prompted by that belief. Ohio Power Company, 215 NLRB 862, 862 (1974); Cambria Clay Products Company, 106 NLRB 267, 270-71 (1953). Accord, N.L.R.B. v. Cambria Clay Products, supra, at 21-5 F.2d 53. Cf. Iowa Beef Processors, Inc., 255 NLRB No. 177 (1981).

Additionally, an employer's honest but mistaken belief that a striker engaged in flagrant or egregious misconduct does not legitimatize a discharge prompted by that belief. Ohio Power Company, 215 NLRB 862, 862 (1974); Cambria Clay Products Company,

106 NLRB 267, 270-71 (1953). Accord, N.L.R.B. v. Cambria Clay Products, supra, at 21-5 F.2d 53. Cf. Iowa Beef Processors, Inc., 255 NLRB No. 177 (1981).

Again, Respondent has not shown that it had a good faith belief that Rodriguez actually engaged in the alleged misconduct. The temporary restraining order apparently was issued after Rodriguez was charged. Even so, the alleged conduct, hitting a few cars as they went by, in light of Respondent's severe unfair labor practices, are not so egregious as to make Rodriguez unsuitable for continued employment. Golden Day Schools, Inc. v. N.L.R.B., 644 F.2d 834 (9th 1981). Therefore, the termination and continued denial of reinstatement of Rodriguez are violations of Section 8(a)(1) and (3) of the Act.

Ernesto Arroyo, Alberto Cortez, Cesar Moran, Javier Olague, Heriberto

Valenzuela, Padilla and M. Rodriguez were arrested for blocking a thoroughfare. As Respondent notes in its brief, Hoy advised Ed Simovich that blocking of a thoroughfare may not justify denial of reinstatement. Therefore, these individuals were offered reinstatement. It is noted that no other alleged acts of misconduct were considered in the Company's decision to reinstate these employees. Further buttressing the conclusion that only misconduct which resulted in criminal charges was considered by Respondent in Its reinstatement decisions. Also, as found hereinbefore, blocking a thoroughfare, under the circumstances of this case, is not sufficiently egregious to warrant removal of the protection of the Act for these employees. Both Padilla and M. Rodriguez were shown to have been cleared of all charges and the failure to timely reinstate these strikes was violative of Section 8(a)

(3) and (1) of the Act. As noted above, the Employer's belief that these parties honestly engaged in the crimes as charged was not shown to be honestly held. However, even assuming such a showing, as previously noted, discharge or failure to reinstate prompted by such belief does not legitimatize the Company's actions. Ohio Power Company, supra; Cambria Clay Products Company, supra. The Company must rebut General Counsel's case with evidence that the unlawful conduct did occur. N.L.R.B. v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

The Striking Employees' Right to Reinstatement Assuming No Condonation

Even if it were found that Respondent had not condoned any strike misconduct, it would still have to show by a preponderance of the evidence that the strikers' misconduct was disqualifying and it has failed to do so. Respondent however

failed to show that it had a good faith belief that these strikers had engaged in serious misconduct as to warrant their discharges; that the failure to reinstate and/or the discharges were for just cause and not for discriminatory reasons. As previously indicated, the reasons advanced by despondent were pretexts. However, even if such pretexts are not found, as the Board stated in Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), enf. ___ F.2d ___ (1st Cir. 1981), 108 LRRM 2513:

> The General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of the protected conduct.

In N.L.R.B. v. Nevis Industries, Inc. d/b/a Fresno Townehouse, 647 F.2d 905 (9th Cir. 1981), the Court noted that Congress intended that employers be required to show an employee was discharged for cause as the employer has the best access to proof of motivation.

Throughout the above recital of facts in this case, there are innumerable instances where the Respondent treated non-striking employees differently than striking employees for engaging in the same or similar acts of misconduct. For example, Respondent alleges various incidents that warrant Ramon Rodriguez's dismissal. Yet the most serious acts of violence that Rodriguez was involved in was as a victim when he was attacked by Vallejos and bloodied. Another example is the treatment accorded to Vincente Banaga, where he was offered reinstatement, where others who had charges pending, and

some of these had never even been charged at all, were made to suffer a suspension. Even more strange is the relatively quick offering of reinstatement to Steven Baugh, who was considered by both Tom and Ed Simovich throughout the strike as particularly violent and offensive. Respondent's lack of investigation of other strikers who may have engaged in serious misconduct, its complete disregard of every single act of misconduct by non-striking employees, demonstrates its disparate treatment of strikers who assertedly engaged in misconduct and more than amply suffices to show a prima facie case of illegal motivation. Finally, Respondent's termination letters fail to explicate the reasons for this action, contrary to what the Company claims in established procedure and in further evidence of a discriminatory motive.

Respondent has not produced any evidence that it actually investigated and reviewed the records of each employee nor did it clearly show by what process these decisions were made. Respondent's evidence that these employees would have been terminated in spite of their protected conduct of engaging in an unfair or practice strike is also negated by Respondent's actual practice of condoning non-striker violence. In sum, with the exception of Gutierrez and Ortiz, it is concluded that Respondent has failed to show by a preponderance of the evidence that Solis, Villavicencio, Almaroz, Cortez, Arroyo, Moran, Olague, Padilla, R. Rodriguez, M. Rodriguez and H. Valenzuela did engage in disqualifying conduct. Rutter-Rex, supra. Further, even if the strike was found be an economic strike, Respondent has not shown it held a good faith belief that these 11 employees were guilty of the charged

misconduct since 3 of these employees already had the charges dismissed when the Company, which kept in close contact with the sheriff's office, asserted that the charges were the basis for its failure to reinstate and/or discharge employees in this classification. General Counsel has sustained its burden of proving that the Respondent's actions toward these strikers were discriminatorily motivated. Respondent, through its chief operating officer, Tom Simovich, displayed animus. Other indicia of unlawful motive include disparate treatment of striking employees, reasons found to be mere pretext, uncontroverted contradictory reasons, much delayed explanations, condonation; the Company clouded its real intention to reinstatement the strikers with false

reasons.[188] The Company's willingness to believe allegations by non-striking employees without fulling investigating them, contrary to its established practice, when non-striking employees were similarly accused of wrongdoing[189] warrants the inference that the allegations wrongdoing were an excuse rather than the reason for the delayed reinstatement and/or discharge. The failure of the Company to explain to any of these employees that alleged misconduct other than

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[188] For example, Tom Simovich, claimed that one of the reasons Solis was not reinstated was due to the fact that he was a lazy employee who retained his job by lodging frequent charges against the Company with the Federal or State Equal Employment Opportunity Commission. This basis for the Company's actions was never presented in any other explanations for the decision to discharge Solis. The advocacy of shifting grounds for an employee's discharge is indicative of discriminatory motivation. See N.L.R.B. v. Scholl Steel Products, Inc., 340 F.2d 568, 573 (C.A. 5, 1965).

[189] See Winchester Spinning Corp. v. N.L.R.B., 402 F.2d 299,

that resulting in criminal charges indicates that this was not the real reason for the decision. A.J. Krajewski Mfg. Co. v. N.L.R.B., 413 F.2d 673, 676, fn. 2 (C.A.. 1, 1969); N.L.R.B. v. Lowell Sun Publishing Co., 320 F.2d 835, 840 (C.A. 1, 1963). This conclusion is strengthened by the fact that none of the alleged misdeeds which were not the subject of criminal charges were mentioned in the discharge letters. N.L.R.B. v. Waco Insulation, Inc., 567 F.2d 596, 601 (C.A. 4, 1977).[190]

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[190] Even assuming arguendo that there was a proper reason for the discharge of one or two of the strikers, this is not a defense where, as here, the discharge was actually made for an improper purpose. John Klann Moving & Trucking Co., v. N.L.R.B., 411 F.2d 261, 263 (C.A. 6, 1969); Boren Motor Sales, Inc. v. N.L.R.B., 425 F.2d 677, 680 (C.A. 7, 1970); Satra Belarus, Inc. v. N.L.R.B., 568 F.2d 545, 548 (C.A. 7, 1978). Therefore, Respondent has not shown that it legally terminated these 11 strikers for strike misconduct and their terminations and denials of reinstatement are violations of Section 8(a)(3) and (1) of the Act.

V. Conclusions of Law

Upon the foregoing findings of fact, and the entire record herein, I make the following conclusions of law:

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America--UAW (International Union or Union); and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America--UAW, Local 509 (Local Union), are labor organizations within the meaning of Section 2(5) of the Act.

3. The unit as described herein is appropriate for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. At all times since December 14, 1978, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

5. The work stoppage which began on October 15 was delayed by the Respondent's unfair labor practices as of November 5, 1980.

6. By threatening to have striking employees fired and/or arrested while they were peacefully picketing, Respondent interfered with, restrained and coerced employees in the exercise of their Section 7 rights and engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

7. By offering, on November 2, 1979, Manuel Avalos and Ernesto Franco increased benefits if they abandoned the strike and returned to work in order to

induce employees to withdraw their support for the Union and the strike, Respondent has interfered with its employees' Section 7 rights and has violated Section 8(a)(1) of the Act and bargained directly with employees in the described unit in violation of Section 8(a)(5) and (1) of the Act.

8. By threatening employees on the picket line with vehicular assault, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

9. By discharging Steven Baugh and Jose Naranjo on October 17, 1979; Baugh, Joe Solis, Eduardo Ortiz and Ruben Gutierrez on October 25, 1979; and Francisco Zamora on March 7, 1980, because of their membership in or activities on behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

10. By unilaterally granting to its employees the benefit of additional paid holidays without notifying or consulting with the Union in good faith, Respondent violated Section 8(a) (5) and (1) of the Act.

11. By withdrawing recognition from the Union and thereafter failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the aforesaid unit until a decertification has been processed, Respondent has violated Section 8(a)(5) and (1) of Act.

12. By refusing to bargain collectively with the Union, by refusing to furnish or unduly delaying the furnishing of certain information which is relevant to the Union's performance of its representation responsibilities on behalf of unit employees, Respondent has violated Section 8(a)(5) and (1) of the Act.

13. By failing and refusing, since April 21, 1980, to make timely offers of reinstatement to the following unfair labor practice strikers: Steven Baugh, Jose G. Naranjo, John Gresko, Henry Carrillo, Filiberto Ruiz, Tomas Vargas, Jose Naranjo, Manuel Cruz, Nicholas Diaz, Ernesto Franco, Pedro Pena, Salvador Hernandez, Erasmo Salazar, Rene Gallardo, Marvin Cummings, Salvador Garcia, Octaviano Arellano, Javier Olague, Ernesto Cortez, Pedro Garcia, Jesus Valdez, Salvador Elizarraras, Ernest Lopez, Wallace Kerr, Alejandro Lopez, Jose Pedroza and Raymond Wise, because they engaged in protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

14. By failing and refusing since May 9 to make timely offers of reinstatement to Vincente Inez Gonzales Banaga, Raul Cortex, Oscar Guerrero, Calvin Hassler, David Hassler, Ronald Kerr and Manuel Avalos,

because they engaged in protected concerted activity, Respondent violated Section 8(a)(3) and (1) of the Act.

15. By limiting the duration of the reinstatement rights of Andrade Gonzalo, Manuel Garay, Javier Lopez and Jose Reyes to the length of their tenure with Respondent because they engaged in protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

16. By discharging on or about June 10, 1980 Antonio Andrade, Alejandro Arroyo, David Coronado, Ricky Craft, Enrique Figueroa, Lorenzo Franco, Mickey Lambright, Jesus Valdez and Frank Zamora, and failing and refusing to reinstate these employees because they engaged in protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

17. By unlawfully requiring Jesus Valdez on or about August 6, 1980 to execute

an application and take a physical examination as a new employee as a condition to reinstatement and accept employment as a new employee, Respondent violated Section 8(a)(3) and (1) of the Act.

18. By placing on a list as permanently replaced strikers, terminating and failing to reinstate Martiniano Rodriguez, Francisco Zamora, David Coronado, Antonio Andrade, Alejandro Arroyo, Javier Arroyo, Ricky Craft. Enrique Figueroa, Lorenzo Franco and Mickey Lambright because they engaged in protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

19. By failing to give Elpidio Cortez and Armando Escandon a reasonable amount of time to respond to the offer of recall, Respondent violated Section 8(a)(3) and (1) of the Act.

20. By unlawfully failing and refusing to offer timely reinstatement to Carlos Almaroz, Ernesto Arroyo, Alberto Cortez, Cesar Moran, Javier Olague, Jose Padilla, Ramon Rodriguez, Martiniano Rodriguez, Joe Solis, Heriberto Valenzuela, Jose Villavicencio, and other strikers named herein and by discharging on October 31, 1980 Jose Villavicencio, Carlos Almaroz and Ramon Rodriguez, Respondent has violated Section 8(a)(3) and (1) of the Act.

21. By placing impermissible preconditions for reinstatement upon the striking employees including the acceptance of new employee status, Respondent violated Section 8(a)(3) and (1) of the Act.

22. By unilaterally changing job classifications and affording new hires superior employment opportunities without substantial business justification as a means

to delay or deny reinstatement, Respondent violated Section 8(a)(3) and (1) of the Act.

23. By the more rigorous application of disciplinary measures against individuals engaged in protected concerted activity because they engaged in such activity, Respondent violated Section 8(a)(3) and (1) of the Act.

24. By considering misconduct previously condoned in determining that some striking employees would not be reinstated, Respondent violated Section 8(a)(3) and (1) of the Act.

25. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

VI. The Remedy

It having been found that Champ Corporation has violated the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The appropriate remedy in this proceeding is a broad cease and desist order, which is responsibly warranted based on the findings showing Respondent's propensity to generally violate the Act.

In view of the long duration of the strike, commencing on October 15, 1979 and ending April 7, 1980, the extremely long period since the end of the strike and the numerous persistent and flagrant unfair labor practices of Champ Corporation which prolonged the strike, certain special remedies are necessary to restore, insofar as practicable, the status quo ante. In all probability, many of the strikers have since

taken employment with other employers and may of necessity moved to other locations. They should be accorded full and equitable opportunity to consider present offers of reinstatement, free of any fears of the recurrence of the unfair labor practices against them.

Respondent, therefore, shall, in addition to the usual postings, prepare a Spanish translation of the official English language notice, since the record reveals that a substantial number of Respondent's employees speak Spanish; both English and Spanish versions shall be simultaneously posted on all plant bulletin boards[191] and copies of both versions mailed to each employee currently employed and to each employee named in Schedules I through V appended hereto. All diligent efforts shall

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[191] See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

be employed by the Respondent to assure that such communication reaches the addressees, including the acceptance of assistance by the Union, if offered. Respondent shall provide the Regional Director for Region 21 with proof of such mailing.

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, it is recommended that Respondent be required to provide the International Union, in writing with: (1) A description of the job duties performed by all unit employees for the preceding 12 months and (2) the dates of layoff of all unit employees who had been laid off during the preceding 12 months. In addition, Respondent shall meet and participate in negotiation sessions and cease refusing to do so based on the decertification petition found herein not to raise a valid question of the representative status

of the International Union. It is also recommended that Respondent be ordered to cease unilaterally changing the existing terms and conditions of employment by paying non-striking employees for days its facilities are shut down, without prior notification and bargaining with the International Union. Finally, it is recommended that the Union cease and desist from unilaterally bargaining with its employees.

I shall also recommend reinstatement of the unfair labor practice strikers, with the exceptions noted hereinabove, and in the order and appended schedules, upon their unconditional offer to return to work and the dismissal of persons hired on or after November 5, 1979, if that becomes necessary. N.L.R.B. v. W.C. McQuaide Co., 552 F.2d 519, 520-29 (3rd Cir. 1977); Newport News Shipbuilding and Dry Dock Company, 236 NLRB

1637 (1968), enf. 602 F.2d 73 (4th Cir. 1979). Reinstatement shall mean reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges inasmuch as no striking employees were offered reinstatement within 5 days after the date each unconditionally offered to return to work, the dates backpay commences are the dates of the unconditional offer to return to work. Hudson Chemical Company, 258 NLRB No. 9 (1981). Backpay shall therefore be computed for those employees found eligible for reinstatement by calculating for each of them a sum equal to their individual wages as of the date of their unconditional offer to return to work up to the date of Respondent's offer of reinstatement, less any net earnings during such period, with interest thereon to be computed in the manner prescribed in Florida

Steel Corporation, 231 NLRB 651 (1977).[192]

It is also recommended that those employees found to have been discriminatorily discharged while engaged in a lawful strike will be "entitled to backpay from the date of discharge until the date he is offered reinstatement." [Citations omitted], Abilities and Goodwill, Inc., 241 NLRB 27 (1979).

Respondent will also be required to comply with the Order and to post appropriate notices.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[192] Hasa Chemical, Inc., 235 NLRB 903 (1978) See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Order[193]

The Respondent, Champ Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a. Threatening employees with replacement, termination, discharge or other reprisal for engaging in a protected strike or other concerted activities, or coercing or soliciting employees to abandon such activities.

b. Threatening to have striking employees arrested.

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[193] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

c. Threatening employees on the picket line with vehicular assault.

d. Promising employees increased benefits if they abandon the strike and Union and return to work.

e. Discharging striking employees, refusing to reinstate, or offering to grant reemployment only as new employees because they have engaged in a protected strike or other concerted activities for their mutual aid or protection.

f. Unilaterally implementing contract proposals affecting changes in wages and other terms and conditions of employment of employees represented by the Union.

g. Withholding recognition from the International Union and thereafter failing and refusing to recognize the International Union as the exclusive

collective bargaining representative of the employees in the described unit.

h. Failing to give or unnecessarily delaying in giving the Union, on request, information relevant for the Union's representational duties as the exclusive bargaining representative of the employees in the described unit.

i. Unduly delaying or discriminatorily failing and refusing to reinstate striking employees because they engaged in protected concerted activity.

j. In any other manner discouraging membership in the Union or any other labor organization by discrimination with regard to hire or tenure of employment or any term or condition of employment.

k. In any other manner,[194] interfering with, restraining, or coercing

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[194] See Abilities and Goodwill, supra.

employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Take the following affirmative action designed to effectuate the policies of the Act:

a. Offer each of the unfair labor practice strikers that Respondent classified as permanently replaced, as listed in the attached Schedule I, immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees for any loss of earnings, in the manner set forth in "The Remedy" section of this decision.

b. Offer Ronald Kerr and Marvin Cummings immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees contained in the same category for any loss of earnings, as detailed in the attached Schedule II, except

where noted therein as having no such entitlement, in the manner set forth in "The Remedy" section of this decision.

c. Offer each of the unfair labor practice strikers classified by Respondent as being on layoff, as listed in the attached Schedule III, immediate reinstatement to their former jobs or, if such jobs no longer exist, to subtantially equivalent jobs, and make whole such employees for any loss of earnings, in the manner set forth in "The Remedy" section of this decision.

d. Make whole each of the unfair labor practice strikers, as listed individually in the attached Schedule IV, for any loss of earnings occasioned by Respondent's failure to reinstate these employees in a timely fashion, in the manner set forth in "The Remedy" section of this decision.

e. Offer Jose Villavicencio, Carlos Almaroz, Alberto Cortez, Cesar Moran and Ramon Rodriguez immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole such employees as appear on the attached Schedule V for any loss of earnings, in the manner set forth in "The Remedy" section of this decision.

f. Expunge from Respondent's personnel records any and all referernces to the discriminatory actions found herein.

g. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary and pertinent to compute the amount of backpay due in accordance with the section of this decision entitled "The Remedy."

h. Post at its plant in South El Monte, California, copies of the attached notice marked "Appendix,"[195] and simultaneously post a notice containing a Spanish language version of the official notice. Copies of said notice, to be furnished by the Regional Director for Region 21, after being duly signed by authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by

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[195] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent to insure that said notices are not altered, defaced, or covered by other material.

i. Mail a copy of the above-described notices to each currently working employee and to each unfair labor practice striker listed in Schedules I through V in the manner set forth in "The Remedy" section of this decision.

j. Notify the Regional Director for Region 21, in writing, within 20 days from the receipt of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the amended complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated: Feb. 4, 1982

Joan Wieder
Administrative
Law Judge

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL AT WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD BY THE FOLLOWING:

The National Labor Relations Act gives all Employees the following rights:

To organize themselves;

To form, join, or support unions;

To bargain as a group through representatives of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT threaten to fire striking employees or to have them arrested while they are peacefully picketing.

WE WILL NOT offer employees increased benefits if they abandon the strike and return to work.

WE WILL NOT threaten employees who are picketing with vehicular assault.

WE WILL NOT discharge or otherwise discriminate against you for engaging in activities on behalf of the Unions, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America-UAW (International); and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America--UAW, Local 509, or any other labor organization.

WE WILL NOT deviate from our disciplinary system or apply it in a disparate manner by discharging or otherwise disciplining our employees because of their interest in or activity on behalf of the Unions, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; UAW; and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of

America--UAW, Local 509 (hereinafter the union), or any other labor organization.

WE WILL NOT refuse to bargain collectively vith the International Union by refusing to furnish it with information or unduly delaying furnishing information that it requests which is relevant and reasonably necessary to their representational duties.

WE WILL NOT refuse to bargain collectively with the International Union by unilaterally granting employees additional paid days off without notifying or consulting with the Union in good faith.

WE WILL NOT withdraw recognition from the International Union and thereafter fail and refuse to bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit until a decertification petition has been processed.

WE WILL NOT discharge, refuse to reinstate, offer or grant reemployment only as new

employees, limit the duration of the reinstatement rights, or otherwise discriminate against employees because they have engaged in a protected strike or other concerted activities for their mutual aid or protection.

WE WILL NOT consider misconduct previously condoned in determining whether some striking employees will be reinstated.

WE WILL NOT offer reinstatement by granting an unreasonably short period of time to respond to the offer of recall.

WE WILL NOT unilaterally change job classifications or descriptions or afford new hires unwarranted superior employment opportunities as a means of delaying or denying reinstatement.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section

7 of the National Labor Relations Act, as amended.

WE WILL furnish the Union a description of the job duties performed by all unit employees for the preceding 12-month period and the dates of layoff of all unit employees that had been laid off during the preceding 12-month period.

WE WILL, upon request, recognize and bargain with the International Union as the exclusive collective bargaining representative of our employees in the following described appropriate unit with respect to wages, rates of pay, hours of employment and other terms and conditions of employment and if an understanding is reached, embody such understanding in a signed written agreement.

The appropriate unit includes:

> All production and maintenance employees, including shipping and receiving employees, lead persons,

service employees, inspectors and truck drivers employed by Respondent at its facilities located at 2439 North Rosemead Boulevard, 2500 North Rosemead Boulevard, and 2423 Troy Street, South El Monte, California; exluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL send to all our employees copies of this notice written in both Spanish and English.

WE WILL offer those of you found eligible for reinstatement recall in a manner that affords you a reasonable amount of time to respond.

WE WILL, in good faith, offer each of the discriminatees and/or unfair labor practice strikers, as set forth in the Order and Schedules attached hereto, immediate reinstatement to their former jobs or, if such jobs no longer exist to substantially

equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired in their former jobs.

WE WILL expunge from our personnel records any and all references to the discriminatory actions found in this case.

WE WILL make whole all discriminatees and/or strikers for any loss of earnings they may have suffered (and subject to certain further questions to be determined in the compliance stage of this proceeding) by reason of their unlawful terminations, denials of reinstatement, delayed reinstatement, or rehiring only as new employees, or listed in the attached Schedules I through V, for any loss of earnings, in the manner set forth in the section of this decision entitled "The Remedy," and the Order.

CHAMP CORPORATION

(Employer)

Dated_____By_____
(Representative)(Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. City National Bank Building, 24th Floor, 606 South Olive Street, Los Angeles, CA 90014 [Telephone: (213) 688-3200]

SCHEDULE I

Employees Permanently Replaced Who Were Terminated

	Backpay Periods, if any
Antonio Andrade	April 17, 1980 to present, as further determined at compliance
Alejandro Arroyo	April 17, 1980 to present, as further determined at compliance
Javier Arroyo	April 17, 1980 to present, as further determined at compliance
David Coronado	April 17, 1980 to present, as further determined at compliance

Ricky Craft	April 17, 1980 to present, as further determined at compliance
Enrique Figueroa	April 17, 1980 to present, as further determined at compliance
Lorenzo Franco	April 17, 1980 to present, as further determined at compliance
Mickey Lambright	April 17, 1980 to present, as further determined at compliance
Francisco Zamora	April 17, 1980 to present, as further determined at compliance
Martiniano Rodriguez	March 7, 1980 to present, as further determined at compliance

SCHEDULE II

Employees Who Did Not Personally Appear on April 21

	Backpay Periods, if any
Vincent Inez Banaga	May 9 to July 18, 1980
Raul Cortez	May 9 to July 10, 1980
Oscar Guerrero	May 9 to July 10, 1980
Calvin Hassler	May 9 to July 10, 1980
David Hassler	May 9 to July 10, 1980
Dexter Kerr	No entitlement to reinstatement or backpay

Ronald Kerr	May 9 to present, entitled to reinstatement
Randolph Montoya	No entitlement to reinstatement or backpay
Manuel Avalos	May 9 to July 11, 1980
Marvin Cummings	May 9 to present, entitled to reinstatement

SCHEDULE III

Employees on Layoff

	Backpay Periods, if any
Gonzalo Andrade	April 17 to present
Manuel Garay	April 17 to present
Javier Lopez	April 17 to present
Jose Reyes	April 17 to present

SCHEDULE IV

Employees Whose Reinstatement Was Delayed

	Backpay periods, if any
John Gresko	April 17 to May 9, 1980
Henry Carrillo	April 17 to May 9, 1980
Filiberto Ruiz	April 17 to May 9, 1980
Tomas Vargas	April 17 to May 15, 1980
Jose Naranjo	October 17, 1979 to May 5, 1980
Steven Baugh	October 17, 1979 to May 16, 1980

Manuel Cruz	April 17 to May 19, 1980
Nicholas Diaz	April 17 to May 19, 1980
Armando Escando	April 17 to July 31, 1980
Elpidio Cortez	April 17 to June 17, 1980
Ernesto Franco	April 17 to May 21, 1980
Pedro Pena	April 17 to May 22, 1980
Salvador Fernandez	April 17 to May 22, 1980
Erasmo Salazar	April 17 to May 22, 1980
Rene Gallardo	April 17 to May 23, 1980
Salvador Garcia	April 17 to May 23, 1980
Octaviano Arellano	April 17 to May 23, 1980
Ernesto Cortez	April 17 to May 27, 1980
Salvador Elizarraras	April 17 to May 27, 1980
Ernesto Lopez	April 17 to May 27, 1980
Wallace Kerr	April 17 to May 29, 1980
Pedro Garcia	April 17 to May 29, 1980
Alejandro Lopez	April 17 to May 29, 1980
Pedro Lopez	To be determined during backpay proceedings
Jose Pednoza	April 17 to May 30, 1980
Raymond Wise	April 17 to May 30, 1980
Jesus Valdez	April 17 to September 10, 1980

SCHEDULE V

Employees Charged

	Backpay Periods, if any
Ruben Gutierrez	From October 25, 1979 to date of disqualifying behavior, to be determined during the compliance phase of this proceeding
Eduardo Ortiz	From October 25, 1979 to date of disqualifying behavior, to be

	determined during the compliance phase of this proceeding
Joe Solis	October 25, 1979 to present
Jose Villavicencio	April 17 to present
Carlos Almaroz	April 17 to present
Alberto Cortez	April 17 to November 12, 1980
Ernesto Arroyo	April 17 to January 31, 1981
Cesar Moran	April 17 to present
Javier Olague	April 17 to October 30, 1980
Jose Padilla	April 17 to September 29, 1980
Ramon Rodriguez	April 17 to present
Martiniano Rodriguez	(See Schedule I)
Heriberto Valenzuela	October 17, 1979 to October 9, 1980

CHAMP CORPORATION

(Employer)

Dated _____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions

may be directed to the Board's Office, City National Bank Building, 24th Floor, 606 South Olive Street, Los Angeles, CA 90014 [Telephone: (213) 688-3200]

STATUTES INVOLVED

National Labor Relations Act (29 U.S.C. Sec. 151 et seq.)

Sec. 8 [§ 158.] (a)[Unfair labor practices by employer]

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage, or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement

when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as

a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

* * *

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is

empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) [Compliant and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to

issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order

based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title, 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent or agency or the

Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstate of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That

in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual

as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e)[Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States or if all the

courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting

aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence shall show to the satisfaction of the court that such additional evidence and is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board

may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(g)[Institution of court proceedings as stay of Board's order] The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

* * *

Administrative Procedure Act (5 U.S.C. 500 et seq.)

§ 551. Definitions

For the purpose of this subchapter -

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; as except as to the requirements of section 552 of this title -

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

* * *

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel, or if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the

convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in any agency proceeding.

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No. 91-314

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

CHAMP CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW, LOCAL 509,

Respondents,

RESPONDENT UNIONS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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29 U.S.C. § 151 et seq. 3

Respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW, Local 509 (hereinafter referred to collectively as "the Union" or "the UAW") respectfully oppose the petition of Champ Corporation for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

I

STATEMENT OF THE CASE

Petitioner Champ Corporation (hereinafter "Champ" or "the Employer") seeks a writ of *certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit, reported at 933 F.2d 688, enforcing the Decision and Order of

the National Labor Relations Board (hereinafter "the Board" or "the NLRB") reported at 291 NLRB No. 119. In that decision the NLRB found that Champ had violated the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (hereinafter "the NLRA" or "the Act") and ordered it to provide back pay and reinstatement to the employees it had unlawfully discharged and refused to reinstate and to take other affirmative action to remedy these violations.

The Union Respondents rely on the NLRB's recital of the evidence presented and the proceedings below in its Brief in Opposition to Petition for Writ of Certiorari.

II

REASONS FOR DENYING THE PETITION

There are no sound reasons to grant a writ of *certiorari* in this case. Champ's petition raises two issues for review: (1) whether the Board's delay in deciding this case excuses Champ from paying back pay to its employees and (2) whether the Board and the Ninth Circuit properly determined that Champ's unfair labor practices converted the Union's strike into an unfair labor practice strike. Neither warrants extraordinary review via *certiorari*.

The first issue--whether administrative delay is a defense to Champ's back pay obligations--was decided over twenty years ago. NLRB v. J.H. Rutter-Rex Mfg. Co., Inc., 396 U.S. 258 (1969). Champ has not cited Rutter-Rex at any point in its

petition for *certiorari*. Indeed, Champ did not even raise this issue below, either when it originally briefed this case or in its request for reconsideration. Its petition for *certiorari*, which fails to cite the controlling Supreme Court precedent on an issue it never raised below, is simply frivolous.

Champ's second issue--whether Champ's unfair labor practices converted the strike into an unfair labor practice strike--is likewise not worthy of review. As Champ concedes in its petition for *certiorari*, its dispute with the Court of Appeals concerns questions of fact peculiar to this case, rather than any general issues of law. Champ does not, in fact, even claim that the Ninth Circuit's standard for determining how an economic strike may be converted into an unfair

labor practice strike is wrong or inconsistent with the standards applied by any other Circuits.

Instead, Champ's quarrel with the Court of Appeals is over that Court's determination that the Board's finding that the strike was "aggravated or prolonged" by Champ's unfair labor practices is supported by substantial evidence. Supreme Court review of a Court of Appeals' decision on this question is almost never appropriate. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Champ has not shown any reasons why *certiorari* should be granted in this case.

1. **Champ Has Not Raised The Defense of Administrative Delay At Any Time in the Proceedings Below.**

Champ's first argument is that the NLRB's failure to decide this case in a timely fashion excuses it from its obligation to pay back pay to the employees whom it wrongly refused to reinstate. (Petition for Certiorari, pp. 10-14) Champ never raised this issue at any time in the proceedings below. It has not offered any explanation for its failure to do so or even recognized the impropriety of raising an issue for the first time its petition for a writ of *certiorari*.

An issue that has not been raised in the Court below is not properly before this Court, even if presented in the petition for *certiorari*. Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981).

There is no reason to deviate from that rule in this case.

2. **Champ Has Not Presented Any Grounds For Reversing This Court's Decision in *NLRB v. J. H. Rutter-Rex***

Even if Champ had preserved this issue on appeal, it has not presented any reasons for reversing this Court's decision in Rutter-Rex. The Court in Rutter-Rex considered and rejected all of Champ's arguments in terms too clear to be misunderstood:

> Assuming without deciding that the delay in issuing the specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement

of the full back pay remedy was an abuse of the Board's discretion. Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer. In view of "the economic hardship caused by many years of undeservedly substandard earnings," lengthy delays "must render the back pay award a wholly inadequate and unsatisfactory remedy" to the employees for the company's refusal to reinstate them. . . . [T]he Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees for the benefit of wrongdoing employers.

396 U.S. at 264-65 (citations omitted)

The Court reaffirmed Rutter-Rex in NLRB v. Iron Workers Local 480, 466 U.S. 720, 724-25 (1984). No decision of this Court has suggested at any time in the last twenty years that either Rutter-Rex or Iron Workers Local 480 is no longer good law. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898-99 (1984). Champ, for its part, does not even mention these decisions, let alone explain why this Court should reverse them.

Champ does, however, rely heavily on four Circuit Court decisions to argue that it is entitled to rely on the Board's delay in deciding this case as grounds for refusing to pay back pay to the employees it unlawfully discharged or refused to reinstate. NLRB v. Mountain Country Food Store, Inc., 931 F.2d 21 (8th Cir. 1991);

Texas Petrochemicals Corp. v. NLRB, 923 F.2d 398 (5th Cir. 1991); NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1991); Emhart Industries, Hartford Division v. NLRB, 907 F.2d 372 (2d Cir. 1991). These cases do not hold this and do not support a petition for *certiorari*.

Of these four cases, three are not even apposite.[1/] As for the fourth case, the Court of Appeals' comments on this issue in that case are at most *obiter*

[1/] In Country Food Store the Court of Appeals denied enforcement to an NLRB order on the ground that changed circumstances made the Board's order practically meaningless. The Board's order did not provide for back pay. 931 F.2d at 22. In Texas Petrochemicals the Court stayed the Board's order requiring the successor employer to bargain and remanded in order to permit the holding of a representation election. 923 F.2d at 406. In Brookshire Grocery the Court of Appeals denied enforcement of the Board's order on the merits, mentioning the Board's delay in deciding the case only in passing. 919 F.2d at 362-64.

dicta, since the Court had already denied enforcement of the Board's order on the ground that it was not supported by substantial evidence. Emhart, 907 F.2d at 376-78. What is more, that dictum has since been rejected by a later decision from the Second Circuit, which expressly rejected the reading of Emhart that Champ is pressing here. NLRB v. Aeronautical Industrial District Lodge No. 91, 934 F.2d 1288 (2d Cir. 1991).[2/]

The Court in Emhart Industries did not offer any reasoned explanation for its refusal to follow Rutter-Rex and Iron

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[2/] The Second Circuit distinguished Emhart by noting that the Court's refusal to enforce the Board's order in Emhart was only justified by the substantial changes in circumstances in the years that the case was pending before the Board. The Second Circuit specifically rejected the argument that administrative delay alone is enough to deny a make-whole remedy to wrongfully terminated employees. Id. at 1299.

Workers Local 480.[3/] The Second Circuit has refused to follow that erroneous holding. There is no conflict between the Circuits on this point.

And even if there were, this would not be an appropriate case in which to resolve that conflict, for the simple reason that Champ never raised this issue below. Even if it had, the Ninth Circuit's refusal to shift the cost of the Board's delay from the employer who violated the Act to the employees it wrongfully discharged and refused to

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[3/] The Emhart Court characterized Rutter-Rex and Iron Workers Local 480 as "the majority view"--an odd choice of words, since the cases that would make up the "minority view" are all decisions of lower courts. Odder yet, it put this statement in the past tense: "the majority view seems to have been that denying enforcement on the ground of delay alone 'punishes employees for the Board's nonfeasance.'" 907 F.2d at 379. The Court of Appeals never explains how "be" became "have been."

rehire was correct. *Certiorari* might have been appropriate in Emhart; it is completely inappropriate here.

In this case, as in Rutter-Rex, the Board's delay in deciding this case has harmed "innocent employees . . . [who] had to live for some years on reduced incomes as a combined result of the delay and the company's illegal failure to reinstate them." 396 U.S. at 265-66. Champ asks this Court to reverse Rutter-Rex in order to add to that injury by denying them back pay altogether. That invitation should be rejected.

3. **There Is No Conflict Between the Circuits In Determining When An Employer's Unfair Labor Practices Convert An Economic Strike Into An Unfair Labor Practice Strike.**

Champ's second ground for seeking *certiorari* is its claim that the Court of Appeals misapplied the law in holding that the Employer's unfair labor practices had converted an economic strike into an unfair labor practice strike. This argument turns out on closer inspection to be all about the Ninth Circuit's review of the Board's factual findings and not at all about the standard it applied to them.

Thus Champ concedes that, while the Court of Appeals' original decision in this case "appeared to create a new standard" (Petition for Certiorari, pp.

14), the Court subsequently amended its decision to clarify the standard that it was applying. Champ does not express any disagreement with the standard set out in the Court's amended decision or with its allocation of the burden of proof.

Instead Champ complains that the Board improperly found that its unfair labor practices had aggravated or prolonged the strike. According to Champ there is no substantial evidence to support this finding. (Petition for Certiorari, pp. 17-18) Even if this were true--which it is not--that would not be grounds for a writ of *certiorari*.

Review of the Board's factual findings is an issue which Congress has left to the Courts of Appeals, not this Court. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951). *Certiorari*

is not appropriate except in the rare instance when the Court of Appeals has either misapprehended or grossly misapplied the Universal Camera standard. Id. at 491.

This is not one of those rare instances. The Ninth Circuit did just what it was required to do under Universal Camera: it reviewed the record as a whole, considered both the evidence supporting and detracting from the Board's finding, and concluded that the Board's decision was supported by substantial evidence. Champ has not shown how the Court has either "misapprehended" or "misapplied" the Universal Camera standard, let alone "grossly."

Furthermore, Champ's arguments would have to be rejected even if the Board's findings on this issue were subject to *de*

novo review. The Court of Appeals found abundant evidence that Champ's unfair labor practices aggravated and prolonged the strike, citing (1) Champ's repeated insistence on injecting this issue into negotiations, (2) the unanimous vote taken by employees to remain on strike until all strikers were reinstated and (3) the Union's express refusal to agree to these discharges. Unable to explain away this inconvenient evidence, Champ simply ignores it.

As the Court of Appeals found, employees reacted to Champ's "divide and conquer" tactics by showing increased determination to strike in order to win reinstatement for these wrongfully fired workers, as well as the economic demands that prompted the strike in the first place. The Court weighed this against the

evidence which seemed to detract from this finding--the failure to change the wording of the picket signs and the lack of any formal demand at the bargaining table for the reinstatement of these employees--and found that this evidence did not show that the Board's findings were not supported by substantial evidence. There is no basis for reversal of the Court's careful review of the record evidence.

There is simply nothing in Champ's petition that would warrant grant of a writ of *certiorari* in this case. The petition for writ of *certiorari* should be denied so that this case may be remanded to the Board in order to provide Champ's employees with the remedies they have already waited too long to receive.

III

CONCLUSION

For all the reasons set forth above, respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America - UAW, Local 509 respectfully request that the petition of Champ Corporation for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Ninth Circuit be denied.

DATED: October 17, 1991

Respectfully submitted,

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PROOF OF SERVICE - F.R.C.P. 5(b)

I, Margarita Valdez, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen years, employed in the County of Los Angeles, State of California, and not a party to this action. On, October 18, 1991, I served true copies (as indicated below) of ***RESPONDENT UNIONS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

___ *by personally delivering it to the person(s) indicated below in the manner provided in F.R.C.P. 5(b);*

_X_ *by depositing it in the United States mail at Los Angeles, California, in a sealed envelope with postage thereon fully prepaid to the following:*

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I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.
Executed on October 18, 1991, at Los Angeles, California.

Margarita Valdez

MARGARITA VALDEZ

(5)

No. 91-314

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHAMP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's factual finding that a work stoppage which began as an economic strike was converted to an unfair labor practice strike by petitioner's unlawful discharge of certain strikers.

2. Whether the court of appeals properly enforced the Board's back-pay order.

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CHAMP CORPORATION, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals, 1 Pet. App. 1-53,[1] is reported at 933 F.2d 688; the prior opinion of the court of appeals, 1 Pet. App. 54-102, is reported at 913 F.2d 639. The decision and order of the National Labor Relations Board, 1 Pet. App. 103-164, including the recommended decision of the administrative law judge, 2 Pet. App. 1-639, is reported at 291 N.L.R.B. 803.

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[1] The appendix to the petition comprises two volumes, each paginated separately. References to the first volume will be designated "1 Pet. App." and the second volume "2 Pet. App."

JURISDICTION

The original opinion of the court of appeals, 1 Pet. App. 54, was filed on August 29, 1990. A petition for rehearing was denied on May 20, 1991, 1 Pet. App. 5-6, and an amended opinion was filed on that date. 1 Pet. App. 1. The petition for a writ of certiorari was filed on August 17, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns a strike marked by acrimony and confrontation. 1 Pet. App. 127-132; 2 Pet. App. 50-63, 69-104, 111-137, 175-249. The Board concluded that petitioner Champ Corporation engaged in a variety of unfair labor practices in response to the strike conducted by members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, Local 509 ("the Union").[2] Petitioner challenges only one

[2] In agreement with the ALJ, the Board found that, during the strike, petitioner violated Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), by threatening to have striking employees fired or arrested while they were peacefully picketing, by offering increased benefits to strikers if they abandoned the strike and returned to work, and by threatening employees on the picket line with vehicular assault. 1 Pet. App. 134-135; 2 Pet. App. 604-605. The Board further found that, after the strike ended, petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discharging or refusing to reinstate certain strikers because of their union activities, by refusing to make timely offers of reinstatement to 50 strikers, by limiting the duration of the reinstatement rights of four employees, by placing impermissible preconditions for reinstatement on certain striking employees, and by failing to give two employees a reasonable amount of time to respond to offers of recall. 1

factual finding here: that its unlawful discharge of certain strikers converted the work stoppage from an economic strike to an unfair labor practice strike.

The dispute began on October 15, 1979, when the unit employeees of the Union voted to strike because of dissatisfaction with the progress of negotiations with petitioner Champ Corporation. 2 Pet. App. 46. On the second day of the strike, October 17, General Manager Tom Simovich approached two picketing employees, Baugh and Naranjo. He told them that they were "fired" and that they did not work for petitioner any more. Simovich also directed them to "go home" and threatened to have them arrested if they did not comply with his directive to leave the premises. 1 Pet. App. 111; 2 Pet. App. 107-110.

On October 25, petitioner's labor negotiator, Edmund Hoy, presented union representative Ralph Gazzigli with a list of strikers who "would never be rehired or reinstated under any conditions"; the list contained five names, including Baugh's. 1 Pet. App. 112; 2 Pet. App. 144-146, 157. Gazzigli told Hoy that, as the Union's representative, there was no way he could agree to negotiate away any individual's job. 2 Pet. App. 146-147.

Pet. App. 136-140. Finally, the Board found that petitioner violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by unilaterally granting to its nonstriking employees additional paid holidays without notifying or consulting with the Union, by withdrawing recognition from the Union and thereafter refusing to bargain with the Union until a decertification petition had been processed, and by refusing or unduly delaying the furnishing of information relevant to the Union's performance of its duties. 1 Pet. App. 135-136.

The court of appeals affirmed these findings, many of which were not contested by petitioner, and enforced the Board's order. 1 Pet. App. 53.

At the next negotiating session, on October 31, Hoy announced that he wanted to present a list of employees that petitioner would not take back, even if the parties reached an agreement or the strike ended. Gazzigli cautioned Hoy that putting the list on the table would change the entire mood of negotiations and that, in any event, the Union would not and could not negotiate away any individual's rights or job. Gazzigli suggested that Hoy keep the list and that, if petitioner had any problems with the individuals listed, it should contact the proper authorities and let them take any necessary action. Hoy did not formally present the list to the committee, but he did place it on the table. Steve Baugh, a member of the bargaining committee, recognized several names on the list, including his own. 1 Pet. App. 113; 2 Pet. App. 157-163.

On November 5, the Union conducted a membership meeting. Ralph Gazzigli, the bargaining committee members, and about 55 strikers attended. At the meeting, Baugh related what General Manager Simovich had said to him and Naranjo on October 17—that they might as well go home because they were fired and would never again work for petitioner. Baugh also told the assembled employees about the list he had seen at the October 31 negotiating session, and Gazzigli informed them that he had told petitioner that the Union would not negotiate away any striker's right to reinstatement. The strikers then voted unanimously to support the Union's position that they would not go back to work unless petitioner agreed to rehire all of them. 1 Pet. App. 115 n.10; 2 Pet. App. 163-166.

Early in April 1980, the striking employees discussed whether to terminate the strike. It was agreed

that, because the strike seemed ineffective and the Union had filed numerous unfair labor practice charges against petitioner, the better strategy would be to make an unconditional offer to return to work and to pursue the charges with the Board. 2 Pet. App. 284-285. On April 17, the Union sent petitioner a telegram notifying it that the striking employees unconditionally offered to return to work on April 21. 2 Pet. App. 285. On April 21, over 50 of these employees appeared for work. *Id.* at 287-288. Petitioner, however, did not put any of the strikers to work. Rather, it delayed reinstating any of the strikers until May 9, 1980, and thereafter staggered their recall. *Id.* at 286-287, 291-298, 322-325, 396, 541, 544-545, 550.

2. The Board, in agreement with the ALJ, found that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging Baugh and Naranjo on October 17. 1 Pet. App. 111. The Board noted that General Manager "Simovich's remarks were entirely unequivocal [and] were phrased as an immediate discharge." *Ibid.* The Board further agreed with the ALJ that petitioner "effectively terminated the employment" of four other employees when it presented their names to the Union (as well as Baugh's) and asserted that "they would 'never' resume their employment 'under any conditions.' " *Id.* at 113-114. Finally, the Board agreed with the ALJ that these discharges "served to convert the strike to an unfair labor practice strike" on November 5, 1979. *Id.* at 115 n.10. As the ALJ stated:

> On November 5, during a union meeting, the matter was discussed and the membership voted that no striking employees would return to work

> until all employees, including those listed by [petitioner], were reinstated by the Company. Thus, the record clearly establishes a causal nexus between [petitioner's] unfair labor practice and the decision to not end the strike and return to work until all striking employees were reinstated.

2 Pet. App. 489. Because the Board found the strike had become an unfair labor practice strike, it ordered petitioner, *inter alia*, to offer reinstatement to those strikers not yet reinstated and to make the strikers whole. 1 Pet. App. 143-144, 149-150.[3]

3. The court of appeals, concluding that the Board's decision was supported by substantial evidence, enforced the order. 1 Pet. App. 53. In upholding the Board's finding that the October unlawful discharges had converted the work stoppage from an economic strike to an unfair labor practice strike, the court made clear that it agreed with the standard adopted by the other circuits: that only "violations of the National Labor Relations Act which aggravate or prolong an economic strike will convert it to an unfair

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[3] If the Board had not found that the unfair labor practice converted the work stoppage from an economic strike into an unfair labor practice strike, it would not have ordered this relief. Unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional offer to return to work. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956). Economic strikers, on the other hand, are entitled to reinstatement only if they have not been permanently replaced or as vacancies occur; an employer is not required to discharge permanent replacements hired during the strike to make room for economic strikers. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938).

labor practice strike." 1 Pet. App. 23-24.[4] Applying that standard, the court concluded that the Board's General Counsel had proved that the strike was prolonged or aggravated by the discharges. 1 Pet. App. 23. The court stated that "Champ's notification to the Union's principal negotiator that certain striking employees, including a member of the employees' negotiating committee, would never be rehired or reinstated 'under any conditions' expanded the existing economic dispute between the parties to include the employment status of striking employees and delayed settlement of the strike." 1 Pet. App. 25. The court added that, in view of "this direct challenge to union solidarity and collective action," a resulting "vote of the membership * * * to remain on strike until all strikers were reinstated [w]ould have been foreseeable to any rational employer." *Ibid.*

The court rejected petitioner's contention that no conversion finding could be made because the discharges had not become an issue in bargaining negotiations during the strike. 1 Pet. App. 28. The court found that petitioner had "gratuitously presented the issue of the company's refusal to rehire the dis-

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[4] In its initial decision, the court stated that an economic strike " 'becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices.' " 1 Pet. App. 72, citing *NLRB* v. *Top Mfg. Co.*, 594 F.2d 223 (9th Cir. 1979). The court added that, "[t]o the extent" its test differed from that of another circuit, it would adhere to circuit law. 1 Pet. App. 73-74. Petitioner requested rehearing, contending that the court had established a new and erroneous standard concerning strike conversion which conflicted with that of other circuits. The court denied the petition for rehearing but amended its opinion to clarify that it had applied the uniformly accepted "aggravate or prolong" standard. 1 Pet. App. 3, 23-24.

charged employees" during the negotiations, that its "impact in the pending negotiations should have been obvious," and that, in any event, "the record shows that the Union's negotiator informed [petitioner's] representative that the Union could not agree to deny reinstatement to any person." *Id.* at 29-30.

ARGUMENT

The petition presents two issues. The first is a fact-bound question of substantial evidence on which the court of appeals' decision is unassailably correct. And the second is, by statute, unreviewable because petitioner failed to raise it before the NLRB. Neither issue involves a split in circuit authority; nor do they present questions of overriding national importance. Accordingly, review by this Court is unwarranted.

1. Petitioner no longer disputes that it unlawfully discharged five striking employees. It challenges only the Board's finding, upheld by the court of appeals, that those discharges converted the economic work stoppage into an unfair labor practice strike. Petitioner acknowledges, as it must, that the court of appeals confirmed the well-settled standard for determining this issue—whether the subsequent unfair labor practices expanded or prolonged the course of the strike. Pet. 17; 1 Pet. App. 23 ("We agree with Champ that the burden is on the General Counsel to *prove that the unfair labor practices aggravated or prolonged the strike.*" (emphasis added)); *id.* at 24 ("[W]e agree with those circuits that have adopted the principle that violations of the National Labor Relations Act *which aggravate or prolong* an economic strike will convert it to an unfair labor prac-

tice strike." (emphasis added)).[5] Petitioner simply objects to the Board's and the court of appeals' application of that settled standard; it argues that substantial evidence does not support the Board's finding of prolongation here. Pet. 16, 18. Such a fact-bound issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the record amply supports the Board's finding that petitioner's unfair labor practices prolonged the strike.

In deciding whether an unfair labor practice has converted an economic strike into an unfair labor practice strike, the Board considers both objective criteria concerning the likely effect of the practice and subjective evidence of its actual effect. As the court explained in *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1981):

> Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice.

Accord *C-Line Express*, 292 N.L.R.B. 638 (1989).

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[5] See, *e.g.*, *Soule Glass & Glazing Co.* v. *NLRB*, 652, F.2d 1055 (1st Cir. 1981), citing *NLRB* v. *Top Mfg. Co.*, 594 F.2d 223 (9th Cir. 1979); *NLRB* v. *Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978); *NLRB* v. *Jarm Enterprises, Inc.*, 785 F.2d 195, 204 (7th Cir. 1986); *Facet Enterprises, Inc.* v. *NLRB*, 907 F.2d 963, 977-978 (10th Cir. 1990); *Rogers Mfg. Co.* v. *NLRB*, 486 F.2d 644, 649 (6th Cir. 1973); cert. denied, 416 U.S. 937 (1974).

Here, both objective and subjective factors support the Board's conversion finding. Petitioner not only told various union members that they were fired, but gratuitously injected that issue into the bargaining negotiations by taking the position that certain strikers would not be reinstated under any circumstances —a position from which petitioner never retreated. As an objective matter, petitioner should have known that its stance would prolong the strike; it is axiomatic that reinstatement for strikers is often a critical element in the settlement of a strike. *See Air Line Pilots Ass'n Int'l* v. *O'Neill*, 111 S. Ct. 1127 (1991); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 499-508 (1983); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232-237 (1963). And it takes little foresight to predict that such actions could antagonize strikers and prolong the strike, as singling out certain workers is a threat to union solidarity and collective action. 1 Pet. App. 25. Indeed, the Union's negotiator told petitioner that its position on reinstatement would aggravate matters. 2 Pet. App. 160.

The subjective evidence of strike prolongation is even stronger. At a union meeting, various members complained that they had been fired; others reported that petitioner had tendered a list of individuals who would, under no circumstances, be rehired. 2 Pet. App. 163-164. The members unanimously voted not to return to work unless petitioner agreed not to single anyone out. *Id.* at 164-165. This action by the employees—unanimously voting not to return unless all strikers were offered reinstatement—clearly demonstrated that the unfair labor practice of firing striking workers had become an issue in the strike.

Petitioner also contends that the discharges could not have prolonged the strike as the economic issues that separated the parties at the strike's inception were unresolved at its conclusion. Pet. 18. While commission of an unfair labor practice during a strike

does not automatically convert the strike into an unfair labor practice strike, " '[t]he employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor.' " *NLRB* v. *Jarm Entersal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 *prises, Inc.*, 785 F.2d 195, 204 (7th Cir. 1986), quoting *NLRB* v. *Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978); accord *Soule Glass*, 652 F.2d at 1080. The fact that economic issues were unresolved does not negate the inference that the employees would have ended the strike sooner or that the negotiating atmosphere would have been better had petitioner not aggravated matters by firing and flatly refusing to reinstate certain strikers.[6]

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[6] None of the cases cited by petitioner support its contention that the Ninth Circuit has applied the conversion test differently than other circuits. In *NLRB* v. *Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978), Pet. 16, on facts similar to those here, the court upheld the Board's finding that the discharge of strikers during an economic strike converted it into an unfair labor practice strike. 574 F.2d at 840; see also *Rogers Mfg. Co.* v. *NLRB*, 486 F.2d 644, 649 (6th Cir. 1973) (insistence on superseniority for strike replacements prolonged strike). Petitioner's reliance on *Soule Glass*, 652 F.2d at 1080, Pet. 15-17, is similarly misplaced. The court there did reject the Board's finding of conversion, but the facts were very different from those here. The employer in *Soule Glass* granted a wage increase to nonstrikers; the court agreed that the wage increase set a floor under which the union would not settle its outstanding economic demands but found that it had no effect on the length of the strike because the union was already adamantly demanding a wage increase greatly in excess of that granted the nonstrikers. *Id.* at 1080-1082, 1105-1106. Here, in contrast, the employer's refusal to reinstate workers actually triggered the Union's demand that all workers be reinstated.

Furthermore, in *Jarm Enterprises*, 785 F.2d at 204, Pet. 19, the court *upheld* the Board's finding that the employer's re-

2. The second issue raised by the petition is whether the six-and-one-half-year delay between issuance of the administrative law judge's recommended decision and the issuance of the Board's decision and order made enforcement of the order unreasonable.[7] Specifically, petitioner contends that the court of appeals "abdicat[ed] * * * its responsibility to ensure the reasonableness and fairness of the Board's decisions," Pet. 14, by enforcing the Board's order despite the delay. But there is a reason why the court of appeals never reached the issue of delay: Petitioner never raised it.[8] Because petitioner failed to pre-

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fusal to provide financial data impeded bargaining negotiations, and in *NLRB* v. *Burkart Foam, Inc.*, 848 F.2d 825, 832 n.6 (7th Cir. 1988), Pet. 15, the court agreed with the Board that an employer's unlawful refusal to execute an agreement prolonged the strike. In neither case did the court demand a showing of how the negotiations were actually delayed. Indeed, the facts here are much stronger than they were in *Jarm*: the court there noted that "[t]his is not the classic example of strike conversion where the unfair labor practice becomes an issue that further motivates the strikers." 785 F.2d at 204. But this case is. There is direct evidence that strikers were affected by the unfair labor practice and that they actually voted to remain on strike until that practice was rescinded. See pp. 5-6, *supra*.

[7] The ALJ's decision issued on February 4, 1982; the Board's decision issued on November 25, 1988. The Board has recently taken steps to eliminate excessive delay in its proceedings. See Statement of James M. Stephens, Chairman of the National Labor Relations Board, *Hearings Before Subcomm. of the House Comm. on Appropriations*, 102d Cong., 1st Sess. Pt. 7, at 593 (1991).

[8] Petitioner asserts that it "expressed concern" that, because of administrative delay, the consequences of enforcing the Board's order would "likely prove economically fatal." Pet. 11. But review of the briefs filed in the court of appeals—now lodged with the Court—reveals that petitioner's expression of concern did not rise to the level of advancing a legal

sent the issue to the court of appeals, review by this Court is inappropriate. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983).

Review of this issue is not only inappropriate; it is prohibited by statute. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner never urged this argument on the Board; nor has it attempted to demonstrate "extraordinary circumstances" which would excuse that failure. If petitioner believed that delay made the Board's remedial order unfair, it should have raised that argument before the Board in a petition for reconsideration. Its unexcused failure to do so forecloses consideration of the issue here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (Petitioner "could have

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argument. Nowhere did petitioner argue that, even if the Board's unfair labor practice findings were upheld, enforcement of its remedial order would be inappropriate because of delay. Rather, it concluded its argument concerning whether the strike became an unfair labor practice strike by stating that, in light of the extreme consequences of enforcement "(greatly exacerbated by the Board's inexcusable neglect in processing the parties' exceptions), *the Board's failure to establish a nexus between the alleged unfair labor practices and a prolongation of the strike requires a denial of the enforcement of the Board's order.*" Pet. Opening Br. 13 (emphasis added); see also Pet. Reply Br. 8. It goes without saying that asking the court to deny enforcement because the Board failed "to establish a nexus" between the unfair labor practice and prolongation of the strike is not the same as asking the court to deny enforcement because of administrative delay. As the briefs make clear, petitioner asked for only the former in the court of appeals; here, it urges the latter as well.

objected to the Board's decision in a petition for reconsideration or rehearing. The failure to do so prevents consideration of the question by the courts."); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979).

In any event, petitioner's claim is meritless. Petitioner does not contend that the Board's order is not necessary to make the strikers whole. Rather, petitioner contends that, because of administrative delay, making the employees whole would be unduly burdensome. Pet. 12. But such a contention is legally insufficient: This Court has made clear that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969); accord *NLRB* v. *Int'l Ass'n of Bridge Workers, Local 480*, 466 U.S. 720, 725 (1984).[9] It is also factually unsupported, as petitioner cites nothing in the record to support its claim of "extreme consequences."

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[9] The court of appeals cases relied upon by petitioner, Pet. 12-13, are inapposite. In those cases, unlike here, the courts found that, due to administrative delay, the Board's order was no longer appropriate to restore the status quo ante. See *NLRB* v. *Mountain Country Food Store, Inc.*, 931 F.2d 21, 22 (8th Cir. 1991) (cease and desist order not warranted where controversy that led to union handbilling on employer's property had become moot); *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 404-406 (5th Cir. 1991) (bargaining order not appropriate where employee complement had experienced large turnover); *Emhart Indus.* v. *NLRB*, 907 F.2d 372, 378-380 (2d Cir. 1990) (order barring unilateral changes in reinstatement policy inappropriate where all employees had been reinstated and plant had closed). And, in *NLRB* v. *Brookshire Grocery Co.*, 919 F.2d 359, 365 (5th Cir. 1990), the discussion of delay was dictum; the reinstatement order was found inappropriate because of the employee's misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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